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1902

CANADIAN CRIMINAL CASES ANNOTATED.

A Series of Reports of Important Decisions in Criminal and Quasi-Criminal Cases in Canada under the Laws of the Dominion and of the Provinces thereof, with special reference to Decisions under the Criminal Code of Canada, 1892, in all the Provinces ; with Annotations, a Table of Cases Cited and a Digest of the Principal Matters.

EDITED BY
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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE SIR JOHN ALEXANDER BOYD, CHANCELLOR, AND FERGUSON, J.

THE KING v. SCULLY.

Court of General Sessions—Records—Custody of by clerk of the peace—Public documents—Inspection—Right of accused to demand certified record of acquittal—Fiat of Attorney-General unnecessary—Mandamus—Action for malicious prosecution—Evidence—46 Edw. III.—Cr. Code 654.

1. The judgments of the Courts of General Sessions in Ontario are public records, and the clerk of the peace holds them as their statutory custodian in the interests of the public generally and not as a deputy officer of the Crown.
2. Any person interested in the indictments and records of the Court of General Sessions is entitled of right to inspect them.
3. An accused person tried and acquitted in such court is entitled to a copy of the record of such acquittal and of the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to the clerk of the peace to compel the delivery to him of certified copies.

ARGUED: May 16, 1901.

DECIDED: July 10, 1901.

THIS was a motion by way of appeal from an order of Falconbridge, C.J.K.B., in Chambers, dismissing a motion for a prerogative writ of mandamus.

By the motion a reversal of such order was asked for, and for the issue of an order that such prerogative writ of mandamus do forthwith issue directed to John Idington, Esquire, K.C., clerk of the peace in and for the county of Perth, commanding him to deliver to the applicant, Cornelius Scully, the plain-

tiff in an action of *Scully v. Peters*, a record of the proceedings in the case of *The Queen v. Cornelius Scully* tried at the general sessions of the peace at Stratford, in the said county of Perth, and directing him to make and deliver to the said Cornelius Scully a certified copy of the indictment and endorsements in the said case as the same now appears in his hands; or ordering him in such other form as to such other matters in respect of the said proceedings as may seem meet; or for an order that the said John Idington, as an officer of this Court, do produce the said indictment and all other proceedings in the said case at the trial of the action of *Scully v. Peters*, and all certified copies of the records of the said proceedings in his custody or control; or that such further or other order might be made as might seem just.

The motion was addressed to the Attorney-General for Ontario, and to the said John Idington, the said clerk of the peace.

The indictment against the said Cornelius Scully was for stealing forty-one saw logs, the property of Louis Peters.

At the trial at the sessions, the learned Judge, after hearing the evidence for the Crown, was of the opinion that there was no evidence to submit to the jury, and he directed the case to be withdrawn from them, and made the following endorsement upon the indictment: "Withdraw the case from the jury—no case—and discharge the prisoner."

An action for malicious prosecution was then brought by the said Cornelius Scully against the said Louis Peters, when a demand was made on the said clerk of the peace for a certified copy of the said indictment with the endorsements thereon, and on his refusal to furnish the same this motion was made.

TORONTO, May 16, 1901.

Arnoldi, K.C., for the appellant. The clerk of the peace is the officer of the quarter sessions having the custody of the books and indictments of the court of quarter sessions. The books and indictments are public documents. He takes possession

of them as *custos rotulorum*. The appellant was entitled to have an exemplification or certified copy of the record of acquittal. Under the statute 46 Edw. III., which is in force in this country, every prisoner on his acquittal is entitled to the record of his acquittal. The fiat of the Attorney-General is not necessary: *Rex. v. Justices of Middlesex* (1834), 5 B. & Ad. 1113; *Rex v. Bowman* (1833), 6 C. & P. 101; *Caddy v. Barlow* (1827), 1 M. & R. 275, and note at p. 279; *Rex. v. Brangan* (1742), 1 Leach C.C. 27; Consol. Stat. U.C. ch. 11, sec. 10. The cases of *Regina v. Ivy* (1874), 24 C.P. 78; *O'Hara v. Dougherty* (1894), 25 O.R. 347, and *Hewitt v. Cane* (1894), 26 O.R. 133 are distinguishable. There the indictments were at the assizes, while here it is an indictment at the sessions, and the rule relied on by the Court in those cases was a rule of the Old Bailey which only applied to that Court.

John R. Cartwright, K.C., for the Attorney-General and the clerk of the peace. The Court are bound by the cases of *Regina v. Ivy*, 24 C.P. 78; *O'Hara v. Dougherty*, 25 O.R. 347, and *Hewitt v. Cane*, 26 O.R., 133. These cases hold that it is essential to procure the fiat of the Attorney-General for the production of the record of acquittal; and the Attorney-General has refused his fiat. There is no distinction between indictments at the sessions and those at the assizes. The clerk of the peace either holds the documents as an officer of the Crown or as an officer of the Court. If he holds them as an officer of the Crown, then the fiat of the Attorney-General is clearly necessary, and if as an officer of the Court, then it can only be produced on an order of that Court. He, however, is an officer of the Crown.

J. H. Moss, for the private prosecutor.

[The Court were of the opinion that the private prosecutor was not before them, and that he could not properly be heard, but allowed him to address the Court].

He relied on the cases referred to by Mr. Cartwright as shewing that the record could not be produced without the fiat of the Attorney-General.

TORONTO, July 10, 1901.

BOYD, C.:—The present case is distinguishable from the points involved in *Regina v. Ivy*, 24 C.P. 78, and *Hewitt v. Cane*, 26 O.R. 133, because the indictment and minutes of acquittal are in the hands of the clerk of the peace, the trial being at the sessions, and not at the assizes. It is his business to make up "a record of conviction or acquittal in any case where it may be necessary," and to make "every copy of a record required to be made by law": R.S.O. 1897 ch. 101, pp. 1042 (38) and 1043 (43). He is the statutory custodian of these papers as a provincial officer, and he holds them in the interests of the public, and not of the Crown. Unlike the English method, where, till 1888 the clerk of the peace was appointed by justices of the sessions, the officer in Upper Canada and Ontario has been always, like the sheriff, an independent functionary appointed by the government with manifold duties, among which are those of clerkship of the court of general sessions: R.S.O. 1897 ch. 56, s. 11, etc.

The concluded proceedings of the quarter sessions are in a legal sense records, even before a record has been formally made up, and are always treated as public documents of a judicial character. They are classed under the term public records in the books upon evidence, and as such appear to be fairly and fully within the meaning of the ancient statute of the realm 46 Edw. III., which was declaratory of the common law. That statute, though not printed till a comparatively recent date, is well recognized in English authorities and by English Judges, and though repealed in England under the English statute revision in 1871, 34 & 35 Vict., ch. 116, it is yet in force in this country by virtue of our first Constitutional Act of 1792.

The text of this statute may be found in Vol. 9, Statutes at Large (quarto), App. p. 45, and its translation in the note to *Caddy v. Barlow*, 1 M. & R. 275. It was read in open Court and discussed in 1691 before the Judges, who all agreed that it applied for purposes of evidence to all records of public

character which were to be searched and exemplified for all persons of whatever record touches them in any manner, whether against the King or not: *Graham's Case* (1691), 12 How. St. Trials 646, at pp. 659-663. The matter is succinctly put in *Foster's Crown Law*, 3rd ed., (1792), p. 229.

Now the books and indictments and records of the quarter sessions are public documents in the hands of the clerk of the peace, which every one interested in has the right to see: *Herbert v. Ashburner* (1750), 1 Wils. 297, and *Rex v. Sheriffs of Chester* (1819), 1 Chitt. R. 476, at p. 479. They are held by the officer as trustee for such persons as it was stated by Denman, C.J., in *Rex v. Justices of Staffordshire* (1837), 6 A. & E. 84, at p. 98. "We are by no means disposed," he said, "to narrow our own authority to enforce by mandamus the production of every document of a public nature, in which any one of the King's subjects can prove himself to be interested. For such persons, indeed, every officer appointed by law to keep records ought to deem himself for that purpose a trustee."

For the purpose of pleading autrefois convict, the Queen's Bench held that the applicant had a right to have the record of the proceedings which passed at the sessions on indictment for felony made up, and to make any use of it he could: *Rex v. Justices of Middlesex*, 5 B. & Ad. 1113. This appears to be an affirmation of the like language used by Willes, C.J., in 1742, who held that every prisoner on his acquittal had an undoubted right to a copy of the record of such acquittal for any use he might think fit to make of it: *Rex v. Brangan* (1742), 1 Leach C.C. 27; and again, it is said by Mr. Justice Patteson in *Regina v. Hewes* (1835), 3 A. & E. 725, at p. 732, with reference to proceedings in the sessions, that if it is necessary for the defendant to have a record made up, and the officer refused to do it, the party having the right to avail himself of the record might apply for a mandamus as in *Rex v. Justices of Middlesex*, 5 B. & Ad. 1113.

These authorities appear to be expressly in point in favour of the present application, and the later cases were not cited in *Regina v. Ivy*.

Upon the general question the present result in England is, as expressed in *Stephen on Malicious Prosecution*, that a prisoner on his acquittal has a right to receive, on demand, a copy of the record of acquittal: p. 101 (1888). The right of the subject is strenuously argued to that result by Mr. Greaves in his note to *Russell on Crimes*, 4th ed., vol. 3, 1865, p. 350. This note under his initials "C. S. G." is repeated in the last edition by Horace Smith (6th ed., 1896). And to it is added in Vol. 3, p. 464, the further note by the editor that "it seems that a person acquitted is entitled to the copy of the record as a matter of right."

See also the note of Mr. Campbell to *Legatt v. Tollervey* (1811), as reported in 12 R. R. 519, in which he says, as to the Old Bailey rule: "It has been pointed out that this order was clearly illegal, as being contrary to the statute, 46 Edw. III.," citing Taylor on Evidence, 9th ed., secs. 1488-9, and cases.

In *Browne v. Cumming* (1829), as reported in 5 M. & R. 118, it is said: "*Semble*, the indittee, is entitled, as of right, to a copy of the record of acquittal." See *Welch v. Clerk* (1756), Barnes R. 468, 9.

The intervention of the Attorney-General, as representing the Crown, and exercising the Royal prerogative in granting or refusing a fiat for procuring a copy of the record of acquittal, does not appear well founded. That is undoubtedly his function in granting or refusing his fiat for writs of error, and his action therein is constitutionally conclusive: see *Re Piggott* (1868), 11 Cox C.C. 311. The duties of this high officer are grouped *sub nomine* in the Encyclopædia of the Laws of England, vol. 1, p. 406 (1897); but the author is silent as to any power of the Attorney-General to stay an alleged right of action for malicious prosecution *in limine*. Rather to be deemed correct is the comment of Mr. Chitty in his *Practice of the Law*, 3rd ed., (1837), vol. 1, par. 1, p. 49, note (e): "It would be . . . monstrous

. . . to prevent an acquitted defendant from trying his civil remedy for the injury to his person and character by an unfounded prosecution. A jury is the only proper jurisdiction to decide upon the propriety of the prosecution." Of course in modern practice the jury decides as to the disputed facts (if any) needful to determine whether there was reasonable and probable cause ; but upon the admitted or ascertained facts the Judge himself (subject to appeal) rules as to the existence of such real and probable cause. According to the constitutional right of the subject, this commends itself as being the proper safeguard for the protection of prosecutors, and not the other method of granting or refusing a fiat for the record.

The present claim as to the fiat appears to be a survival of some ancient practice requiring the sanction of the Attorney-General before one could have access to the general records of the realm ; but this has long become practically obsolete : Taylor on Evidence, 9th ed., secs. 1480-1. To extend this practice to the records of the King's Courts is contrary to the common law, for it belongs to the public of common right to procure copies of public judicial records for the purpose of being given in evidence. See note to *Caddy v. Barlow*, 1 M. & R. 275, at p. 279. It also appears to be, as stated by Taylor, directly at variance with the Act of 46 Edw. III., and to be absolutely inconsistent with the provisions of Magna Charta—*Nulli negabimus vel differemus justitiam* : Taylor on Evidence, 9th ed., vol. 2, secs. 1488-9.

In England, prior to 1888, the practice was to direct the mandamus to the justices of the sessions, because the clerk of the peace was their officer or deputy ; but here he holds an independent title from the Crown, and the High Court will direct him, as the only lawful custodian of the records, to make up and exemplify the particular judgment of acquittal. This officer was first appointed in 1788, before Upper Canada was set apart, to act in conjunction with the courts of quarter sessions then erected in the "new districts" (29 Geo. III. ch. 3., sec. 7 (1789), (Quebec Act)). He is spoken of as an existing

officer in 1806, when the name is first mentioned in Upper Canada legislation, and he is there recognized as a corporation sole,—bonds for security to be taken to him and his successors : 46 Geo. III., ch. 9, secs. 3, 4, 7 and 8.

I may further note that the provision from Consol. Stat. U.C. ch. 110, as to the copy of indictment furnished to the defendant not being "receivable in evidence upon any trial for malicious prosecution," which was quoted with emphasis by the Court in *Regina v. Ivy*, was repealed by 32 & 33 Vict., ch. 36, p. 412 (D.) ; and it was also in the same session re-enacted as to the defendant being entitled to a copy of the indictment *simpliciter* : *ib.*, ch. 29, sec. 47 ; a provision now appearing in the Criminal Code : sec. 654.

I see no escape from the conclusion that the judgment should be reversed, and that the writ asked for should be issued to the clerk of the peace.

FERGUSON, J. :—I agree in the conclusion arrived at in the Chancellor's judgment.

Mandamus granted.

Note : *Record of acquittal—Certificate—Action for malicious prosecution.*

It was held in *Caddy v. Barlow* (1827), 1 Manning and Ryland, 275, by the Court of King's Bench that although the copy of indictment offered in evidence in an action for malicious prosecution may have been granted by the Court of quarter sessions for a different purpose than that for which it was used at the trial, the copy was receivable in evidence without inquiry into the circumstances under which it was granted. The words of the statute 46 Edw. III. are as follows:—

"Also the Commons pray that whereas records and whatsoever is in the King's Court ought of reason to remain there for perpetual evidence and aid of all parties thereto, and of all those whom in any manner they reach, when they have need, and yet of late they refuse, in the Court of our said lord to make search or exemplification of anything which can fall in evidence against the king or in his disadvantage. May it please you to ordain by statute that search and exemplification be made for all persons of whatever record touches them in any manner, as well as that which falls against the king as other persons. *Le roy le voet.*"

The first restriction of this general right appears to have been imposed in the reign of Charles II. by an order made for the regulation of the Old

Bailey sessions by the judges. (Directions for justices at the Old Bailey, Kelyng's Rep. 3.) That order directed "that no copies of any indictment for felony be given without special order upon motion made in open Court at the general gaol delivery, for the late frequency of actions against prosecutors which cannot be without copies of the indictment, deterreth people from prosecuting for the king upon just occasions."

In *Leggatt v. Tollervey*, 14 East 302, the practice was thus stated by Lord Ellenborough, C.J.:—"It is very clear that it is the duty of the officer charged with the custody of the records of the Court not to produce a record but upon competent authority, what at the Old Bailey is obtained upon application to the Court pursuant to the order that has long prevailed there; and, with respect to the general records of the realm, upon application to the Attorney-General." Manning and Ryland in their note to the report of *Caddy v. Barlow*, supra, say: "It appears that originally all judicial records of the king's Courts were open to the public without restraint and were preserved for that purpose." In *Hewitt v. Cane* (1894), 26 Ont. R. 133, 142, Rose, J. referring to the Old Bailey rule, said:—"That was a rule passed by the judges to regulate and govern their own action, and merely was that while the record or indictment remained in the Court during its session, and before it had been sent out as directed by statute, no copy should be given out unless on motion as therein provided, and did not, as indeed it could not, affect the custody or control of the indictment after it had been sent to the proper officer as directed by statute."

The distinction made in the Old Bailey rule between cases of felony and misdemeanor as regards the certifying of the proceedings would seem not to apply after the record or indictment has been returned to the proper office. *Hewitt v. Cane* (1894) 26 Ont. R. at p. 144. In Ontario the practice has been to apply to the Attorney-General for a fiat in cases tried at the assizes. *R. v. Ivey*, 24 U.C.C.P. 78; *O'Hara v. Dougherty*, 25 Ont. R. 347. This practice is based upon the theory that after the criminal records are returned pursuant to the statute to the officer named therein they must be taken to be in the custody of the Crown, and that the Crown, acting through the Attorney-General, its agent general, is the only person competent to give any directions as to the same. The custody of the records in criminal cases by the Clerk of the Crown and Pleas at Toronto (see 14-15 Viet. (Can.) ch. 118 and C.S.U.C. ch. 11, sec. 10) after the return of the indictments to him is not as a record of the High Court of Justice but as an officer of the Crown acting under the supervision of the Attorney-General: *Hewitt v. Cane* (1894), 26 Ont. R. 133. If the bill of indictment has been ignored by the grand jury its production will be evidence of the termination of the criminal proceedings: *R. v. Smith*, 8 B. & C. 341; *R. v. Ivey*, 24 U.C.C.P.; *McCann v. Peneveau*, 10 Ont. R. 573; but in all other cases a formal record of acquittal must be produced; and, *semble*, the certified record should shew whether or not an appeal had been taken under Code secs. 743-746; *Hewitt v. Cane*, 26 Ont. R., at p. 140.

[SUPREME COURT OF THE NORTH-WEST
TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, WETMORE, MCGUIRE AND
SCOTT, JJ.

HOSTETTER v. THOMAS.

Summary conviction—Appeal—Notice of appeal—Service on magistrate for prosecutor—Notice must be addressed to respondent—Verbal statement to magistrate—Code sec. 880 (b)—Code form NNN.

1. A notice of appeal from a summary conviction neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient, though it appears that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor.

DECIDED: June 8, 1899.

This was a reference by WETMORE, J., for the opinion of the Court.

Hostetter was convicted on December 27th, 1897, by J. J. Sadler and R. H. Henderson, two justices of the peace, of having sold one bay mare contrary to the provisions of the Ordinance *re* Stray Animals. The notice of appeal was as follows:—"To J. J. Sadler, justice of the peace of Gainsboro, in the N.W.T. of the Dominion of Canada."

"Take notice that I, Joseph B. Hostetter, of Gainsboro, intend to enter and prosecute an appeal in the Supreme Court of the North-West Territories, at the sittings of the said Court to be holden at Carnduff in the North-West Territories, against a certain conviction bearing date on or about the twenty-seventh day of December, A.D. 1897, and made by you, a justice of the peace in and for the said North-West Territories, whereby I, the said Joseph B. Hostetter, was convicted of having to pay \$10 and \$9.40 costs for having sold one bay mare contrary to the provisions of Ordinance No. 19 of 1894 of the North-West Territories.

"Dated this third day of January, 1898.

"Joseph B. Hostetter."

This notice was served upon J. J. Sadler, and upon no other person; but it was alleged in the affidavit of service that the party effecting such service informed Mr. Sadler at the time of such service that the notice was for the prosecutor.

The questions reserved for the consideration of the Court are set out in the judgment.

No one appeared for either party.

REGINA, N.W.T., June 8, 1899.

The judgment of the Court was delivered by

RICHARDSON, J.:—

This is a reference by Mr. Justice WETMORE to this Court to have determined whether or not a notice of appeal from a summary conviction is sufficient to give him jurisdiction to deal with the appeal.

A copy of the conviction, as also the notice of appeal, is submitted and the following questions put for this Court to answer:—

1. Was the notice properly addressed, and was the service of it on Mr. Sadler sufficient to give jurisdiction in view of the fact that at the time of the service he was informed that the notice was for the prosecutor?

2. Was the notice valid in view of the fact that it alleged the conviction to have been made by Sadler alone, whereas in point of fact it was made by two justices, Sadler and Henderson?

3. Is the notice of the appeal valid inasmuch as it states that the appeal will be entered and prosecuted in the Supreme Court of the North-West Territories, instead of stating it would be to a judge of the Supreme Court of the North-West Territories?

As to the first question submitted—

The notice was neither addressed to, nor served upon, the prosecutor, but was addressed to and served upon Mr. Sadler, one of the justices whose names are signed to the conviction, and by affidavit it appears that when the notice was so served,

Sadler was verbally informed that it was for Thomas, the prosecutor. In *Keohan v. Cook*, 1 Terr. L.R. 125, decided in this Court, it was held that where the notice was not addressed to the respondent it was insufficient, and the facts in that case differ from the present only in respect of the justice here having been informed that the notice was for the prosecutor. In the report of *Keohan v. Cook* no reasons are given for the decision there arrived at.

Section 880 (b) of the Criminal Code requires that notice in the form NNN is to be given "to the respondent or to the justice who tried the case for him," and the form NNN shews that it is to be addressed to "C. D.," one "of the parties to whom the notice of appeal is required to be given." C. D. cannot mean the justice, as in the body of the notice he is referred to as "J. S., Esquire," and the word "you" being in brackets would seem to imply that it is not always necessary that the justice's name should have already appeared in the notice. It follows then that the form requires, as one might fairly have expected, that the notice be addressed to the respondent, and on principle it might be added that compliance with this seems all the more important when the notice is served not on the respondent but on the justice. The fact that the justice when served was told it was for the respondent does not, we think, cure the defect. The notice then being insufficient, it becomes unnecessary to answer the other questions submitted.

Appeal quashed.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE STREET, J.

CLARKE v. RUTHERFORD.

Aggravated assault—Summary trial with consent—Conviction—Civil action not barred—Cr. Code secs. 786, 799, 866.

1. Where a magistrate invested with the powers of two justices tries a case of aggravated assault under the summary trials procedure with the consent of the accused (Code sec. 786), the conviction is a bar to further criminal proceedings for the same cause (Code sec. 799) but not to a civil action for damages.
2. The provisions of Code sec. 866 do not apply to such a case.

ARGUED: March 15, 1901.

DECIDED: May 22, 1901.

THIS was an action tried before STREET, J., without a jury, at the Stratford spring assizes on the 15th March, 1901.

A. M. Panton, for the plaintiff.

Maybee, K.C., for the defendant.

The plaintiff claimed damages for an assault and battery committed by the defendant upon him.

The defendant pleaded that the plaintiff had laid an information before a justice of the peace against him for the assault in question, and that he was brought before the said justice and pleaded guilty of the said offence, and was thereupon adjudged for his said offence to pay a fine of \$20 and the costs of the prosecution; that he thereupon paid the said fine and costs; and was thereby released from all further proceedings, civil or criminal, for the same offence; and that the plaintiff was present when the defendant was brought before the said justice, and consented to the said charge being heard summarily before him and to the conviction being made.

The plaintiff replied denying that he consented to the charge being disposed of by the justice in a summary manner.

It was agreed by the parties that if the plaintiff should be held entitled to recover, his damages should be assessed at \$300.

The facts, so far as material, were as follows :

The plaintiff, on the 21st September, 1899, laid an information before a justice of the peace against the defendant, charging that he "did assault and beat him the said Richard C. Clarke, with intent to do bodily harm, contrary to the statute in such case made and provided."

Both parties appeared before the justice with their counsel. The defendant was asked by him whether he elected to be tried by him or by a jury. The defendant said he would be tried by him, and, the charge being read over to him, he pleaded guilty. The justice refused to accept the plea as he did not know how seriously the plaintiff had been injured, and proceeded to take the evidence. Counsel for the plaintiff objected to the case being summarily disposed of as a common assault, and asked that the defendant be committed for trial, but called his evidence after the defendant had elected to be tried by the justice.

At the conclusion of the evidence the justice drew up a conviction in the following words :

"Be it remembered that on the 21st day of September in the year 1899, at Milverton, William F. Rutherford, being charged before me the undersigned W. D. Weir, J.P., of Milverton, in the county of Perth, and consenting to my trying the case summarily, for that he the said William F. Rutherford did assault and beat Richard C. Clarke, and pleading guilty to such charge, he the said William F. Rutherford is thereupon convicted before me of the said offence ; and I adjudge him the said William F. Rutherford for his said offence to be fined the sum of \$20 and the costs of this action, payable forthwith, or to be committed to the common gaol for 21 days."

The defendant paid the fine and costs.

May 22. STREET, J. :—Under sec. 265 of the Criminal Code a common assault is an indictable offence ; and under sec. 864 a charge of unlawfully assaulting and beating may be summarily

heard and determined by any justice of the peace, if neither the person aggrieved nor the person accused object to his doing so.

If the charge is heard under sec. 864 the justice deals with it under his summary jurisdiction; and under sec. 866 his adjudication puts an end to any further proceedings, either civil or criminal, against the defendant for the same assault. But the justice has no jurisdiction to deal with the charge under his summary jurisdiction without the consent of the prosecutor.

The justice in the present case, however, appears to have treated the case as one under sub-sec. (c) of sec. 783 of the Code, which provides that when any person is charged before him with having committed an aggravated assault upon another, he may, under sec. 786, ask him whether he consents that the charge may be tried before him, or whether he desires that it shall be sent for trial by a jury; and if the person charged elects to be tried before him, he may proceed to try him; and, if he pleads guilty or is convicted, he may proceed to sentence him to fine or imprisonment.

This course was followed; the defendant elected to be tried before the justice, and, having pleaded guilty, was sentenced to a fine of \$20 and costs in the form RR. to the Code, which is the form applicable to proceedings under the last mentioned sections. The justice, when acting under these sections, does not exercise his summary jurisdiction but his special statutory authority for the summary trial of indictable offences. The consent of the person charged is necessary in most cases to the exercise of this authority, but that of the prosecutor is not. The result is different, for a conviction only relieves the person charged from any further criminal proceedings: see sec. 799; it does not relieve him from a civil action for damages.

I am of opinion, after hearing the evidence, that the plaintiff objected to the exercise by the justice of his summary jurisdiction, and that the case was dealt with under secs. 783 and 786 as an aggravated assault, and that the justice tried it under secs. 786 and 788.

The defendant is, therefore, not relieved by the conviction from the present action; and there must be judgment against him for the \$300, with the costs of the action.

The defendant has counterclaimed for a debt due him by the plaintiff, and it was ordered at the former trial that this debt should be set off. Nothing was said upon the trial before me as to this, and I will make no endorsement upon the record until I am informed as to the disposition intended to be made of the counterclaim, if an agreement exists, or until I have heard evidence as to it.

Judgment for plaintiff.

NOTE.—The conviction in the above case was before one justice of the peace alone, which is not a tribunal authorized to hold a summary trial under Code sec. 783, as is assumed by the learned judge. Even were the justice of the peace invested with the powers of two justices, the conviction does not shew on its face that he was acting in that capacity.—ED.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, RITCHIE AND TOWNSHEND, JJ., AND
GRAHAM, E.J.

THE KING v. WIPPER.

Summary proceedings—Adjournment of hearing—Jurisdiction of magistrate—Constitutional law—Power to confer summary jurisdiction to try criminal offences—B. N. A. Act, secs. 91, 92, 101—Canada Temperance Act—51 Vict. (Can.) ch. 34—Crim. Code, secs. 840, 857.

1. The Dominion Parliament has jurisdiction to confer upon justices of the peace appointed under provincial authority jurisdiction to summarily try criminal offences.
2. Section 103 of the Canada Temperance Act, R.S.C. (1886), ch. 106, as amended by 51 Vict. ch. 34, sec. 6, enabling any two justices of the peace to adjudicate upon prosecutions under that Act, is *intra vires* of the Parliament of Canada.
3. On the return of a summons in a summary proceeding before justices of the peace, the person summoned must wait a reasonable time after the hour named in the summons, when the justices are at that hour engaged in other official business.

DECIDED: March 15, 1901.

THE defendant was convicted and fined \$50 and costs by C. C. H. Eaton and J. A. North, two justices of the peace for the County of Kings on July 10th, 1899, "for that he, the said Henry Wipper, unlawfully kept for sale intoxicating liquors in his hotel at Kentville, in the said County of Kings on May 24th, A.D. 1899, contrary to the provisions of the second part of the Canada Temperance Act, then in force in the County of Kings.

On September 5th, A.D. 1899, a writ of certiorari issued out of the Supreme Court, on the application of the defendant, to remove the said conviction and all things touching the same by order of the Honourable Mr. Justice Townshend on the ground that the said justices who made the said conviction were not clothed with the power or jurisdiction by the proper legislative authority to sit as a Court of summary criminal jurisdiction and make said conviction or to issue the said summons or take the said information on which the said conviction is founded.

HALIFAX: March 27 and 28; December 11 and 12, 1900.

The defendant moved on notice given to the prosecutor to quash the above conviction on the following grounds:—

1. Because the said justices who made the said conviction were not clothed with the power or jurisdiction by the proper legislative authority to sit as a Court of summary criminal jurisdiction and make said conviction or to issue the said summons or take the said information on which the said conviction is founded.

2. Because there is no Act of Parliament giving the said justices summary criminal jurisdiction or constituting them a Court of summary criminal jurisdiction or enabling or empowering them to make the said conviction.

3. Because sec. 6 of ch. 34 of the Acts of Parliament of Canada for 1888 is *ultra vires* the Parliament of Canada.

4. Because the said justices had no jurisdiction to adjourn the trial of the said Henry Wipper, which resulted in his said conviction, from ten o'clock in the forenoon of July 10, 1899, to twelve o'clock noon of the same day, and in so adjourning the said trial, they, the said justices, lost jurisdiction over the person of the said Henry Wipper.

5. Because the said justices at the same time they adjourned as aforesaid the trial of the said Henry Wipper, had no evidence before them, nor was any such evidence ever offered or tendered to them at said time to prove the service of any summons on the said Henry Wipper to appear before them to answer to the charge for which he was so convicted as aforesaid.

R. L. Borden, K.C., *J. A. Chisholm* and *J. J. Power*, for the defendant.

W. E. Roscoe, K.C., for the prosecutor.

HALIFAX: March 15, 1901.

GRAHAM, E.J., delivered the judgment of the Court:—

By an amendment to the Canada Temperance Act contained in 51 Vict. ch. 34, it is provided that "prosecutions under that

Act may be brought before any Judge of the sessions of the peace . . . or two justices of the peace . . . having jurisdiction where the offence was committed."

This conviction brought up by a writ of certiorari was made before two justices of the peace having jurisdiction where the offence was committed; but it is contended that this tribunal could not make a valid conviction, because under the British North America Act, secs. 91 and 92, the Provincial Legislature alone can legislate in respect to the constitution, maintenance and organization of Courts of criminal jurisdiction, and therefore, it is said, alone can give jurisdiction to such a Court.

By the Revised Statutes of Nova Scotia, 5th series, ch. 101, the Lieutenant-Governor in Council is authorized to appoint justices of the peace in and for the several counties. By sec. 4 it is provided that each person on being so appointed shall be invested with all the rights, powers, privileges, immunities and advantages heretofore had, held, exercised and enjoyed by any justice of the peace as heretofore appointed in the province, and shall be entitled to the rights, privileges, immunities and advantages heretofore given, granted and extended to any justice of the peace as well by statute and Act of the General Assembly as otherwise.

By ch. 102 of "Civil Procedure in Magistrates' Courts" jurisdiction is given to justices to entertain civil cases of debt not exceeding \$80 (two justices sitting when the amount involved exceeds \$20), and a litigant on application may have a jury.

Chapter 103 of "Summary Convictions and Orders by Justices of the Peace" defines the power of, and regulates the procedure to be taken before, justices of the peace to enforce a penalty or punishment which under any Act of the province is imposed, and which is made recoverable before, or may be inflicted by, a justice or justices of the peace.

The Provincial Legislature has also provided for the appointment of constables to execute the process of the justices of the peace, and gaols to enable the sentences to be enforced.

In fact they are as fully equipped as tribunals of that nature can reasonably expect to be.

Then there are various statutes of the Province, take for instance the Liquor License Act, the Railway Act, and other statutes containing provisions for penalties and punishment to enable obedience to the provincial laws to be enforced, and, for the recovery and infliction of those penalties and punishments, justices of the peace have jurisdiction. And before the Canada Temperance Act was passed, and even before the Confederation of the Provinces, there were acts of that character. So that if a justice or justices of the peace sitting in one of such cases is to be deemed a Court, these are, and were under the provincial laws, such Courts with jurisdiction at least in respect to penalties and punishments for the enforcement of provincial statutes.

Then apparently the Parliament of Canada can by its statute provide that the penalties and punishments provided by its laws may be recovered and inflicted before those Courts. For that I rely upon the case of the *Attorney-General v. Flint*, 16 Can. S.C.R. 707. There the statute of the Parliament of Canada provided that all penalties and forfeitures under "this Act" (The Inland Revenue Act) might be prosecuted, sued for, and recovered in . . . the Court of Vice-Admiralty (an Imperial Court) having jurisdiction in the Province in Canada, where the cause of prosecution arises. The Chief Justice said: "The Parliament of Canada has the sole, exclusive power to legislate on the subject of the Inland Revenue of the Dominion, and in the exercise of that power the unquestionable right to impose the penalties prescribed . . . and declare how and in what Courts in the Dominion such penalties may be prosecuted, sued for, and recovered, and in selecting the Court of Vice-Admiralty . . . the Parliament of Canada in no way exceeded its exclusive legislative power." And referring to *Valin v. Langlois*, 5 App. Cases 115, the present Chief Justice of Canada said: "The Lord Chancellor in delivering the judg-

ment of the Privy Council expressly recognizes the power of Parliament to confer a new jurisdiction on provincial Courts."

The defendant relied upon a sentence which appears in the judgment of the learned Chief Justice of Canada in the case of *In re County Courts of British Columbia*, 21 Can. S.C.R. 446. "The jurisdiction of Parliament to legislate as regards the jurisdiction of provincial Courts is, I consider, excluded by sub-sec. 14, sec. 92 before referred to, inasmuch as the constitution, maintenance and organization of provincial Courts plainly includes the power to define the jurisdiction of such Courts territorially as well as in other respects." The learned Chief Justice was referring to a provincial statute dealing with the jurisdiction of County Court judges, and he upheld it by shewing that the Provincial Legislature had power to enact it under secs. 91 and 92 of the British North America Act already referred to. But it is not necessary in this case to controvert the position that the Provincial Legislature had the power to constitute Courts of criminal law and define the jurisdiction both territorially as well as in other respects in deciding that the Parliament of Canada had also the power under sec. 101 of the British North America Act to establish Dominion Courts. Then it is provided that the "Parliament of Canada may, notwithstanding anything in this Act" (I emphasize those words) "from time to time, provide for the constitution, maintenance and organization of a General Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada." It is true that the learned Chief Justice of Canada did use the expression "excluded" in respect to the power of Parliament to legislate as regards the jurisdiction of provincial Courts, but he is referring only to provincial Courts and sub-sec. 14 of sec. 92, and had not before his mind (because it was not necessary to the case) sec. 101 and Dominion Courts. He could not have intended to unsay what had been said by himself in *Attorney-General v. Flint*, and by other judges in the cases of *Valin v.*

Langlois, and the Maritime Court case, *The Pictou*, 1 Cartwright's Constitutional Cases, 557.

Section 101 is very frequently referred to in the case of *Valin v. Langlois*, 3 Can. S.C.R. 1. Fournier, J., at p. 51, said: "That on the contrary, by sec. 101 the Government of Canada is invested with the power of creating a Court of Appeal and additional tribunals for the better administration of its laws. That ample powers in this respect were given to it precisely because the exclusive power of organizing tribunals for the Province was reserved to the Legislature, and that the two Governments have each their peculiar and exclusive rights of creating tribunals." And Taschereau, J., at p. 75, said: "The constitution, maintenance and organization of provincial Courts of criminal jurisdiction is given to the Provincial Legislature as well as the constitution, maintenance and organization of Courts of civil jurisdiction, yet cannot Parliament in virtue of sec. 101 create new Courts of criminal jurisdiction, and enact that all crimes and offences shall be tried exclusively before these new Courts? I take this to be beyond controversy."

A point was also raised by the defendant in respect to the hour at which the trial was commenced. This case and three others were returnable the same day and hour. The justices met at the hour fixed, 10 o'clock, and a solicitor appeared for the defendant in two cases, but no one appeared in this case. It appears from the affidavits that the justices opened their Court, that the justices or one of them had mislaid the informations, and they announced in the hearing of all that they would take the case as well as the other cases up at 12 o'clock noon. The informations were found and they proceeded with the trials at 12 o'clock in the order which they announced in the beginning when they opened the Court. This case was reached about 2 o'clock p.m., and the defendant not appearing, the service was duly proved by the constable who had, before the return day, returned the summons with a memorandum of service endorsed thereon to one of the justices. It is contended that the justices could not take this case up at that time; that

they had lost jurisdiction. In my opinion they had not. In 1 Burn's Justice of the Peace, p. 113, title, "Conviction, Appearance, or Default," it is said: "Before the 11 & 12 Vict. ch. 43" (enabling the justices to proceed *ex parte* or issue warrant) "in the summons it is usual and on many accounts convenient to fix not only a day but a particular time of the day for the appearance of the party; but if he appears at the time, and the justice shall not attend, he is not to go away, but must wait during the remaining part of the day, for many things may happen to hinder the justice's immediate attendance."

The delay in this case was not unreasonable, the time for the hearing was duly announced, and the defendant has made no affidavit that he was prejudiced by anything that took place—no affidavit of any kind. No case, and I have examined all which were cited to shew that it was necessary to have the service of the summons proved before such an announcement could be made, was cited to shew that the statute (Code sec. 857) that enables an adjournment to be made "*before or during the hearing of any information*" impliedly requires as a preliminary step proof of the service of the summons, for this is really a part of the hearing. It must often happen in cases where there is a long list of summonses that they cannot all be taken up at the hour fixed. And when the justices are reasonably engaged in other official business, I think the defendant must wait a reasonable time.

In my opinion the justice of the peace has jurisdiction, and the motion to quash the conviction should be dismissed.

Motion dismissed with costs.

[YORK GENERAL SESSIONS, ONTARIO.]

BEFORE HIS HONOR JOSEPH E. McDOUGALL, COUNTY JUDGE,
CHAIRMAN OF SESSIONS.

THE QUEEN v. GRAY.

*Summary conviction—Appeal—Security—Money deposit in lieu of recognizance—
Crim. Code, secs. 880 (c), 888.*

1. On an appeal from a summary conviction the appellant making a money deposit in lieu of recognizance must see to it that such deposit is returned by the justice into the Court to which the appeal is taken, and in default, the appeal cannot be heard.
2. The fact that the appellant had made such deposit is a matter of record and is not properly provable by affidavit.

DECIDED: October 10, 1900.

THE defendant had been convicted by Peter Ellis, police magistrate of Toronto Junction, for violating a by-law of the municipality, and had given notice of appeal from his conviction to the sittings of the Court entitled to consider the appeal. In addition to this, he deposited with the convicting magistrate a sum of money sufficient to cover the fine and costs, and costs of the appeal, should he be unsuccessful. No further action by either followed this step until the appeal was called.

DuVernet, for the respondent, took the preliminary objection that the appeal had not been properly lodged.

Maclaren, Q.C., for the appellant, proposed to shew the making of the deposit by the affidavit of the solicitor's clerk who paid the money.

Code sec. 880 (c), so far as it is in point, enacts that "the appellant, if the appeal is against any conviction or order whereby only a penalty or sum of money is adjudged to be paid, may deposit with the justice convicting, or making the order, such sum of money as such justice deems sufficient to cover the sum so adjudged to be paid, together with the costs of the conviction, or order, and the costs of the appeal." Section 888 provides that "if the conviction or order has been appealed

against, and a deposit of money made, such justice shall return the deposit into the said Court; and the conviction or order shall be presumed not to have been appealed against until the contrary is shewn.

And by the Ontario Summary Convictions Act, R.S.O. 1897 ch. 90, sec. 8. the practice and proceedings on an appeal and preliminary thereto and otherwise in respect thereof shall be the same as under Dominion statutes.

TORONTO, October 10, 1900.

MCDougall, Co. J.:—Without deciding whether or not the scheme of furnishing security by a deposit of money applies to a conviction made under an Ontario statute, or under a by-law founded on such, I think that the obligation laid on an appellant by the Code extends beyond the mere leaving of the money with the justice. Its return by the justice into Court, before the time for hearing the appeal, must, in some way, have been secured; and, even if what was done had been sufficient, it could not be established by affidavit.

Appeal quashed.

[WESTMINSTER (B.C.) COUNTY COURT].

BEFORE HIS HONOUR W. NORMAN BOLE, COUNTY JUDGE.

COOKSLEY v. TOOMATEN OOTA.

Stated case—Appeal from justices—Stated case dismissed for non-compliance with statutory conditions—Subsequent appeal from conviction—Waiver—"Appeals," meaning of—R.S.B.C. 1897, ch. 176, sec. 96—Cr. Code, sec. 900 (15).

1. A person "appeals" when he formally gives notice to the opposite party of his intention to appeal, although he does not in fact comply with the conditions precedent required to bring the appeal on for hearing. (Code sec. 900).
2. Under a provincial enactment, similar to sub-sec. 15 of Code sec. 900, providing that a person appealing by way of stated case to a superior Court shall be taken to have abandoned his right of appeal to a County Court, the appellant by obtaining a case to be stated elects that mode of appeal and cannot revert to an appeal to the County Court on the stated case being dismissed for non-compliance with statutory conditions.

NEW WESTMINSTER, B.C., July 29, 1901.

BOLE, Co. J.:—In this case the defendant, a Japanese, was charged before Captain Pittendrigh, S.M., for having on 17th June, 1901, unlawfully come into British Columbia from the United States of America in contravention of the Immigration Act (B.C.), 1900, and fined \$500.

Mr. Wilson K.C., raised a preliminary objection that the case is not now properly before the Court as the appellant having stated a case for the opinion of the Supreme Court, he had by so doing abandoned his right of appeal; and cited numerous authorities in support of this proposition.

Mr. Russell contended that as Mr. Justice Martin had dismissed the appeal entirely because of non-compliance with all statutory conditions precedent, this left his client still at liberty to prosecute his appeal as he gave due notice, etc., as there was virtually no case stated. Sec. 96 distinctly enacts that any person who shall appeal under the provisions relating to a case stated for the opinion of the Supreme Court where he is by law entitled to appeal to the County Court shall be taken to have abandoned such last mentioned right of appeal finally and conclusively and

to all intents and purposes. If appellant has appealed by way of case stated then his appeal to this Court has undoubtedly been abandoned and he cannot be heard; has he done so? The meaning of appealing is giving notice to your adversary of your intention to appeal: *Ex parte Saffery*, 5 Ch. D. 365 (approved in the Court of Appeal in *Christopher v. Croll*, 16 Q.B.D. 66 (C.A.), where the Court held an appeal was brought when notice of appeal was served); and in the written case stated by the stipendiary magistrate it is distinctly averred that the defendant (appellant) alleging that he was aggrieved by the said determination (by which he was fined \$500) as being erroneous in point of law, did within nine days after the date of such determination apply in writing to him, the said magistrate, to state a case for the opinion of the Supreme Court and duly entered into recognizance to prosecute the appeal and I have no reason to doubt the accuracy of these averments.

An election is defined thus in *Scaife v. Jardine*, 7 App. Cas. 369; An election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or he has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further, and, whether he intended it or not, if he has done an unequivocal act—I mean an act that would be justifiable if he elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election. *Vide also Griffith v. Pound*, 45 Chy. D. 558 and 559.

Now it appears to me that the appellant has by giving notice elected to appeal by way of case stated for the opinion of the Supreme Court, and whether that appeal came on for trial or not has to my mind nothing to do with the question; appellant having appealed by way of case stated he is, I think, within the

meaning of sec. 96 of ch. 176, R.S.B.C., 1897, and I think he has finally abandoned his right of appeal to this Court and cannot now be heard.

Appeal quashed.

Note: *Stated Case—Abandonment—Subsequent appeal—Code sec. 900.*

In the case of *R. v. Carwell* (1873), 33 U.C.Q.B. 303, a notice of appeal to the sessions was given, but was irregular because given for the then next sessions instead of the second sessions thereafter, the conviction having been made within twelve days (now fourteen days sec. 880 (a)) of the next sittings. The statute 33 Vict. c. 27, s. 1 (now Code sec. 887) prohibited the allowance of a certiorari if the defendant had appealed from such conviction or order to any court to which an appeal from such conviction or order was authorized by law. The appeal was in consequence not heard, the notice of appeal being held to be inoperative. It was held that there had, in effect, been no appeal and that the right to certiorari had not been taken away. In *Cooksley's Case*, *supra*, the granting of the application for a case stated took the place of a notice of appeal; and, in addition, the recognizance was entered into. But if the application for a stated case had been refused, quære whether the application alone would constitute an "appeal" under the provisions of sec. 900. Sub-section 6 seems to indicate that the recognizance is operative only upon a case being stated.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FALCONBRIDGE, J., IN CHAMBERS.

Re THE QUEEN v. BURKE.

Preliminary enquiry—Offence committed in another county of same Province—Jurisdiction of magistrate—Option of sending accused to county where offence committed—Code secs. 554, 557, 640.

1. The power conferred on a magistrate under Code sec. 557 of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction, to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only.
2. A magistrate may hold a preliminary enquiry in respect of an indictable offence committed in the same Province outside of his territorial jurisdiction, if the accused is, or is suspected to be, within the limits over which such magistrate has jurisdiction, or resides or is suspected to reside within such limits.

DECIDED: July 7, 1900.

Motion on behalf of John Smith, the informant, for an order of prohibition to the police magistrate of Stratford, in the county of Perth, prohibiting the magistrate from committing the defendants Asa L. Burke and John Walsh for trial at the next court of competent jurisdiction for the county of Perth, upon two informations laid before him, upon the ground that the same were properly triable in the county of Bruce, and that as the offences complained of, viz., false pretences and conspiracy to defraud, were committed in the county of Bruce, it was the magistrate's duty to proceed under sec. 557 of the Code and order the accused to be taken before some justice of the county of Huron.

Heyd, Q.C., for the motion.

W. H. Blake, contra.

TORONTO, July 7, 1900.

FALCONBRIDGE, J.:—The use of the words "at any stage of the inquiry" plainly points to the conclusion that the word

"may" in line 6 of sec. 557 of the Code is permissive only ; for if "must" or "shall" be substituted, the section is insensible.

By sec. 640 any court of criminal jurisdiction in Canada is competent to try all offences wherever committed (in the same Province) if the accused is found or apprehended or is in custody within the jurisdiction of such court. See Mr. Justice Taschereau's work at p. 728, and the cases there cited by the learned commentator.

The police magistrate is within his right in the course which he has announced in writing that he will take, and the application will be refused with costs.

Motion refused.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE McCOLL, J.

THE QUEEN v. NICOL.

Defamatory libel—Plea of justification—Witnesses out of Canada—Commission to take evidence—Time of application for—Cr. Code, secs. 302, 634, 683.

1. A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record.
2. An order for a commission to take such evidence should not be made before plea.

DECIDED: June 13, 1898.

THE defendant was indicted upon a charge of defamatory libel, and on the trial entered a plea of justification and moved for an order for a commission under sec. 683 of the Criminal Code to take the evidence of witnesses in England in support of his plea. Objection was taken on behalf of the Crown that the application was too late, and that the defendant should have applied before the trial.

VICTORIA, B.C. June 13, 1898.

A. Martin, for defendant.

C. Wilson, Q.C., and *R. Cassidy*, for the Crown.

THE COURT held that the defendant was not bound to anticipate his plea to the indictment, and was entitled to all of the time up to his arraignment to consider whether he would plead justification. The evidence proposed to be taken abroad under the commission being only as to that plea which had only then been entered, the defendant could not have made the application earlier.

Commission ordered.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FERGUSON, J.

THE QUEEN v. NIXON.

Summary Trial before Police Magistrate—Being Inmate of house of Ill-fame—Prosecution under Part LV.—Jurisdiction of Magistrate without consent of accused—No right of Appeal from conviction—Code secs. 783, 784, 808, 880.

1. There is no right of appeal from a conviction by a police magistrate under the summary trials procedure (part LV.), although the offence is one which the magistrate may try thereunder without the consent of the accused.

DECIDED: September 25, 1899.

Motion for a mandamus requiring the police magistrate for the city of Toronto to admit to bail the defendant, Mary Nixon, now serving a sentence of sixty days in gaol under a conviction by the said magistrate for being an inmate of a house of ill-fame, as required by sec. 880 of the Criminal Code, pending her appeal against her conviction to the Court of General Sessions of the Peace for the county of York. The magistrate was of the opinion that an appeal was not open to the defendant, and the only question upon the motion was whether or not the right of appeal existed. The defendant contended that the prosecution and conviction took place under the provisions of secs. 207 and 208 of the Code, which are in part XV., commonly spoken of as the Vagrancy Act.

Gibson Arnoldi, for the motion.

- *J. W. Curry*, for the magistrate, *contra*.

TORONTO, September 25, 1899.

FERGUSON, J.:—The prosecution is under the provisions of sec. 783, and the conviction under sec. 788, which are in part LV. of the Code. In such a case as this, sec. 784 provides that the jurisdiction of the magistrate is absolute and does not

depend upon the consent of the person charged to be tried by the magistrate, and that such person shall not be asked whether he or she consents to be so tried.

The right of appeal is given by sec. 879, which, as well as the sections following it, which point out the manner of conducting the appeal, is in part LVIII. Section 808, which is in part LV., provides that the provisions of part LVIII. shall not apply to any proceedings under part LV.

By 58 & 59 Vict., ch. 40, sec. 782 of the Code (which shews what the expression "magistrate" in part LV. means and includes) is amended by adding a sub-section providing that when the defendant is charged with any of the offences mentioned in paragraphs (a) and (f) of sec. 783—(f) being the one defining the charge in this case—any two justices of the peace sitting together be added to the list of persons falling within the meaning of the expression "magistrate" as used in part LV.; and the amendment also provides that when any offence is tried by virtue of the sub-paragraph an appeal shall lie from the conviction in the same manner as from summary convictions under part LVIII. This affords an indication that Parliament had it in mind that an appeal did not before lie in cases where the prosecution was for an offence defined by sub-secs. (a) or (f) of sec. 783; and the appeal in such cases lies now only where the case is heard and determined by two justices of the peace sitting together.

However that may be, this prosecution having taken place under sec. 783, and not under the part known as the Vagrancy Act, by reason of the provisions of sec. 808 an appeal is precluded.

Motion refused.

NOTE.—See *R. v. Hawes* (1900), 4 Can. Cr. Cas. 529 and note to same, pp. 532-533.

[SUPREME COURT OF THE NORTH-WEST
TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, WETMORE, McGUIRE AND SCOTT, JJ.

THE QUEEN v. PACHAL.

*Theft—Cattle stealing—Right to trial by jury—N.W.T. Act, sec. 66—
Code sec. 331.*

1. The indictable offence of "stealing cattle" (Code, sec. 331) is theft within the provisions of the North-West Territories Act respecting summary trials without a jury.
2. Although the punishment which may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, a person charged with having stolen cattle the value of which does not, in the opinion of the trial Judge, exceed \$200, has not the right in the N.W. Territories to be tried by jury.

ARGUED: December 4, 1899.

DECIDED: December 9, 1899.

THIS was a case stated for the opinion of the Court by WETMORE, J. The accused was charged before him with having stolen one steer, the value of which did not, in the opinion of the Judge, exceed \$200. It was conceded that the charge was one for stealing "cattle" as defined by sec. 3 (d) of the Criminal Code, 1892. The accused claimed that under sec. 66 of the North-West Territories Act, as amended by 60-61 Vict. 1897 ch. 28, s. 14, and sec. 67 as amended by 54-55 Vict. 1891 ch. 22, he had the right to be tried with the intervention of a jury, and desired to be so tried. WETMORE, J., tried him in a summary way and without the intervention of a jury, and convicted him of the offence charged, reserving for the opinion of the Court the question whether or not the accused had the right to be tried with the intervention of a jury.

L. Thomson, for the Crown.

No one for the accused.

REGINA, N.W.T. December 9, 1899.

The judgment of the Court was delivered by

SCOTT, J.:—This is a case stated by WETMORE, J. The accused was charged before him with having stolen one steer the value of which did not, in his opinion, exceed \$200.

It was conceded at the trial that the charge was one for stealing "cattle" as defined by paragraph (d) of sec. 3 of the Criminal Code.

The accused by his counsel claimed that under the provisions of sec. 66 of the North-West Territories Act as amended by 60-61. Vict 1897 ch. 28, s. 14, and sec. 67 as amended by 54-55 Vict. 1891 ch. 22, s. 9, he had the right to be tried by a Judge with the intervention of a jury of six, and he desired to be so tried. The question reserved for the opinion of the Court is whether he had the right to be so tried.

Sec. 66, as so amended, provides that where the charge is for having committed or attempted to commit theft, embezzlement or obtaining money by false pretences, or receiving stolen property, in any case in which the value of the whole property stolen, embezzled or received does not, in the opinion of the trial Judge, exceed \$200, the charge shall be tried in a summary way without the intervention of a jury.

The charge in this case being one of theft simply, I can see no reason for holding that it is not within the provisions of this section. It is true that the punishment that may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, but the nature of the offence and the value of the property stolen are the only matters which can be taken into consideration in ascertaining whether the charge is within the section referred to.

In my opinion the conviction should be affirmed.

Conviction affirmed.

[COURT OF QUEEN'S BENCH, QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE BOSSE, BLANCHET, HALL, AND OUIMET, JJ., AND
WHITE, J. (*ad hoc*).

THE QUEEN v. FULTON.

Stealing under a power of attorney—Fraudulent sale and fraudulent conversion constituting theft—One offence only—Indictment—Particulars—Defect cured by verdict—Crim. Code, secs. 309, 611, 733.

1. An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property (Code sec. 309), but particulars will be ordered as to the date, nature or purport of the alleged power of attorney.
2. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a reserved case as to whether a verdict of guilty on such indictment was valid or not.
3. A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed.

DECIDED: September 25, 1900.

MONTREAL: September 25, 1900.

The judgment of the Court was delivered by

OUIMET, J.:—

THIS case comes before us on a motion by defendant in arrest of judgment, the decision of which has been reserved to this Court of Appeal by the Court of Queen's Bench, criminal side, under art. 733 Criminal Code.

The defendant has been tried and convicted on the following indictment:—(The learned Judge here read the indictment set forth above).

The offence thus charged is obviously the offence created by sec. 309 of the Criminal Code, 1892, viz.: "theft under a power

of attorney," in other words "stealing by an agent of property whose possession and control such agent has obtained under and in virtue of a power of attorney."

The defendant urges in his motion that this indictment is defective, inasmuch as it does not state that the power of attorney therein mentioned was "for the sale, mortgage, pledge or other disposition of real or personal property."

These are the words of the statute. The record before us shews that before pleading, the defendant moved to quash the indictment for amongst other reasons the same as above. This motion was dismissed by the Court, the Hon. Chief Justice presiding, but particulars were ordered to be put in as regards the date, nature, purport of the alleged power of attorney. These particulars were afterwards declined by the defence, the power of attorney itself having been filed and admitted as proved. This Court is of opinion that the indictment as laid meets with all the requirements of the law and notably with art. 611, secs. 1, 2 and 3 of the Criminal Code.

The essence of the offence charged is stealing under a power of attorney. The indictment distinctly charges the defendant with stealing \$12,541.75 of the moneys of Mrs. Coristine, the proceeds of a sale of valuable securities made by him while acting under a power of attorney. Was it necessary to describe the whole document?—Par. *d* of art. 613 says that such an omission shall not vitiate an indictment—but may in the discretion of the Court be a good reason to order further particulars. This was done.

The alleged omission is at all events only a partial omission, and any defect resulting therefrom is now cured by the verdict. The defendant has suffered no injustice, and this Court sees no reason to interfere with the conviction.

At the argument another defect in the form of the indictment has been urged against it, viz.: that two offences are charged in one count.

As I have said before only one offence is charged—theft. All the other allegations are a mere description of the *modus*

operandi which constitutes the specific offence of stealing under art. 309. The fraudulent sale and the fraudulent conversion of the proceeds of such sale are not alleged as constituting specific offences, but as being the means by which the theft charged was consummated.

The judgment of the Court is that the motion in arrest of judgment be dismissed and the record in the case sent back to the Court below for judgment.

Conviction affirmed.

D. Macmaster, Q.C., and J. Crankshaw, for the prisoner.
J. P. Cooke, Q.C., and R. C. Smith, Q.C., for the Crown.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE SIR WILLIAM RALPH MEREDITH, C.J.C.P., MACMAHON
AND LOUNT, JJ.

THE KING v. DUNGEY.

Selling unwholesome goods—Offering for sale meat unfit for food—Indictable offence—Similar offence under provincial law triable summarily—Changing preliminary enquiry into summary proceeding—Invalidity—Public Health Act (Ont.)—Crim. Code 194.

It is not competent for magistrates where an information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it on the original information.

ARGUED: May 8, 1901.

DECIDED: July 19, 1901.

APPEAL from an order of Robertson, J., refusing a writ of certiorari under the circumstances stated in the judgment of MEREDITH, C.J.C.P.

TORONTO, May 8, 1901.

W. M. Douglas, K.C., for the defendant, contended that there had been excess of jurisdiction, and therefore certiorari

was not taken away, whatever the proper construction of sec. 121 of the Public Health Act, R.S.O. 1897 ch. 248; that the magistrates had proceeded as though on an offence under the Criminal Code, but a defendant would manage his case differently if undergoing only a preliminary hearing, to what he would do if being summarily tried; that they took the evidence under the Code and then convicted under another jurisdiction, which is not permissible: *Miller v. Lea* (1898), 25 A.R. 428. 2 Can. Cr. Cas., 282.

J. H. Moss, for the magistrates, contended that as they regarded the information as one which could be rested either on the Criminal Code or on the Public Health Act, they were justified in holding the matter, as it were, in suspense, and proceeding concurrently under the two statutes; and that as the defendant had cross-examined all the witnesses he was not injured, and cited sec. 121 of the Public Health Act.

Douglas, in reply, referred to *Regina v. Walsh* (1883), 2 O.R. 206; *Regina v. Rowlin* (1890), 19 O.R. 199; *Regina v. Dowling* (1889), 17 O.R. 698; *Regina v. Elliott* (1886), 12 O.R. 524; *Regina v. Brady* (1886), 12 O.R. 358; *Hespeler v. Shaw* (1858), 16 U.C.R. 104; *Regina v. Mines* (1894), 1 Can. Cr. Cas. 217 (Ont.)

TORONTO, July 19, 1901.

The judgment of the Court was delivered by

MEREDITH, C.J. :—

This is an appeal by the defendant from an order of Robertson, J., dated May 6th, 1901, dismissing his motion for an order for a writ of certiorari for the removal into the High Court of the conviction of the defendant on a charge of exposing and offering for sale on the public market in the town of Mitchell a quantity of meat, being dressed beef, unfit for food for man, the same so appearing to the complainant William Brown, sanitary inspector for the town of Mitchell,

and the same being then found in the possession of the defendant.

My learned brother Robertson treated the conviction as one for an offence under sec. 122 (sec. 11 of the by-law) of the Public Health Act, R.S.O. 1897 ch. 248, and being of opinion that the right of certiorari to remove a conviction for such an offence was taken away by sec. 122, dismissed the appellant's motion.

By sec. 194 of the Criminal Code, 1892, 55-56 Vict. ch. 29 (D.), every one is guilty of an indictable offence and liable to one year's imprisonment who knowingly and wilfully exposes for sale or has in his possession, with intent to sell for human food, articles that he knows to be unfit for human food.

By sec. 11 of the by-law in force in the municipality under sec. 122 of the Public Health Act, it is provided "that no person shall offer for sale as food within this municipality any diseased animal or any meat, fish, fruit, vegetables, milk, or other article of food which by reason of disease, adulteration, impurity or any other cause, is unfit for use." The penalty for an offence against this section is a fine of not less than \$5 nor more than \$50, to be recoverable by summary proceedings before any two justices or a police magistrate.

There is no summary jurisdiction to try for an offence against sec. 194 of the Criminal Code, unless with the consent of the accused.

The offences created by the two Acts differ essentially from one another. To constitute the offence created by the Code, the prohibited act must be done knowingly and wilfully, the article must be unfit for human food, it must be exposed for sale or had in possession with intent to sell for human food, and the person must know it to be unfit for human food; while the offence under the by-law is complete where the article is offered for sale as food, not saying human food, and it is a diseased animal or one of the enumerated articles which by reason of disease, adulteration, impurity or any cause is unfit for use, again not saying as human food.

The information which was laid against the appellant charged the offence in substantially the same language by which it is described in the conviction.

It will be observed that it does not accurately describe an offence either under the Code or under the by-law, but the description of the offence more nearly corresponds to the definition of the offence created by the Code, for it alleges that the beef which was exposed and offered for sale was unfit for human food, though, as pointed out by my learned brother, it omits the allegation that the act was done wilfully and knowingly, and with the knowledge that the meat was unfit for human food, which are essential ingredients of the offence created by the Code.

Looking, then, at the information, seeing that it is headed information and complaint for an indictable offence, and having regard to the proceedings before the magistrates, it is manifest, I think, that they treated the charge as one for an offence against the Code. They appear to have begun by calling upon the accused to elect whether he would be tried summarily, and after he had elected against a summary trial they proceeded with the inquiry and took evidence in support of the charge. That occurred on March 7th, and the inquiry was then adjourned for a week.

On March 14th, the appellant being present, the magistrates announced that they concurred in the opinion that a case had been made out under the provisions of the Public Health Act, though not sufficiently serious to warrant them sending the accused for trial under the Criminal Code.

The case was then adjourned until March 19th, as the notes of the evidence shew, "to enable the accused to put in a defence under the new conditions if he so decided."

On March 19th the appellant again appeared, and objected to proceed under the Public Health Act, and asked for a dismissal of the charge against him.

An adjournment was then made until March 26th to proceed with the case under the Public Health Act. This was done against the protest of the appellant.

On March 26th the appellant again appeared and again objected to the case being gone on with under the Public Health Act, and refused to proceed and offered no defence, contending that the proceedings were beyond the jurisdiction of the magistrates. They, however, went on, and one witness was called—William Brown—who gave evidence that he was the complainant and the sanitary inspector for the town of Mitchell, whereupon the magistrates made the conviction which the appellant is seeking to remove into the High Court by certiorari.

I am of opinion upon this state of facts that in assuming to deal with the charge against the appellant as one for an offence against the by-law, and making the conviction for that charge, the magistrates acted without jurisdiction. Though different considerations apply to such a charge as that which was under consideration in *Miller v. Lea*, 25 A.R. 428, 2 Can. Cr. Cas. 282, the principle of the decision is applicable to this case. That principle I understand to be that it is not competent for magistrates, where the information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it on the original information.

The proceedings in question are open to the further serious objection that, even if there was power to change the charge to one under the Public Health Act, no evidence was given of the offence so charged after that change was made. This objection may at first sight appear technical, but it is really not so, for a defendant may, and often does, take a very different course in cross-examining the witnesses in support of the charge made against him where the investigation is only a preliminary one for the purpose of deciding whether he is to be committed for trial, from that which he takes when the magistrate is trying the case summarily and the proceedings may therefore result in a conviction.

There not being, as I think there was not, jurisdiction in the magistrates to try, and convict for, an offence against the

Public Health Act, it is unnecessary to consider the effect of sec. 121 on the right to certiorari, for where there is no jurisdiction, the right to certiorari is not taken away, even if sec. 121 has the effect which my brother Robertson thought should be given to it.

The appeal will therefore be allowed and the order appealed from be discharged, and an order for the certiorari must go with costs of the appeal to be paid by the respondent to the appellant.

Order for certiorari.

[VANCOUVER COUNTY COURT, BRITISH COLUMBIA.]

BEFORE HIS HONOUR W. NORMAN BOLE, COUNTY JUDGE.

McSHADDEN v. LACHANCE.

Common assault—Appeal from conviction—Time for recognizance or deposit—Condition precedent—Default—Jurisdiction over costs of appeal not perfected—Cr. Code. secs. 265, 280, 284.

1. Where on an appeal from a summary conviction the appellant does not make the deposit in lieu of recognizance until after the sittings of the appellate court at which he should have brought the appeal on for hearing, and for which notice was given, the appeal cannot be heard.
2. There is no jurisdiction to award costs against the appellant in respect of the proceedings in appeal at any other sittings than the one for which notice was given (Code sec. 284).

VANCOUVER, B.C., July 9, 1901.

BOLE, CO.J. :—This appeal is from a conviction of the police magistrate, Vancouver, made 20th April, 1901, whereby the appellant was fined \$5 and \$2 for a common assault. The notice of appeal is admitted, but the requisite deposit in lieu of recognizance was not made until June 18, 1901, notwithstanding the fact that a Court at which the appeal might have been heard, sat on June 5, when the appellant admittedly did not appear or take any steps toward prosecuting same. I am therefore of opinion that I cannot entertain the

appeal, it not being properly before me, and I doubt my power, under sec. 884 of the Code, to award costs, as this present sitting is not the same sitting for which the notice of appeal herein was given, as I understand the section.

Appeal quashed.

Note: *Appeal from summary conviction—Notice of appeal—Recognizance—Code sec. 880.*

The procedure by way of "stated case" is a form of appeal; *R. v. Simpson Company*, 2 Can. Cr. Cas. 272 (Ont.); but proceedings by way of certiorari are not. *R. v. Graham* (1898), 1 Can. Cr. Cas. 405 (Ont.). An appeal not being a common law right, the conditions precedent prescribed by statute must be strictly complied with. *R. v. Joseph*, 4 Can. Cr. Cas. 126 (Que.) The giving of security is an essential part of the appeal, and unless it is done in the manner required by statute, the giving of a notice of appeal will be unavailing, and the conviction may be prosecuted as if no notice of appeal had been given. *Ibid.*

Where security is given by recognizance, the recognizance must be that of two sureties besides the appellant, and the appeal will be quashed if the recognizance is given with only one surety. *R. v. Joseph*, 4 Can. Cr. Cas. 126 (Que.). It is not necessary that the recognizance should be accompanied by affidavits of justification by the sureties, the sufficiency of the sureties being a matter entirely for the justice before whom the recognizance is given. *Cragg v. Lamarsh*, 4 Can. Cr. Cas. 246 (N.W.T.). If a deposit is made in lieu of recognizance the appellant must see to it that such deposit is returned by the justice into the court to which the appeal is taken, and in default the appeal cannot be heard, *R. v. Gray*, 5 Can. Cr. Cas. 24, ante, per McDougall, Co. J., Toronto.

Giving notice of appeal is "appealing," *R. v. Lynch*, 12 Ont. R. 378; *Ex parte Saffery*, 5 Ch. D. 365; *Christopher v. Croll*, 16 Q.B.D. 66. But if the notice be for the wrong sittings and is therefore inoperative there has been no appeal. *R. v. Caswell* (1873), 33 U.C.Q.B. 303. The notice is invalid if not addressed to any person, *Cragg v. Lamarsh*, 4 Can. Cr. Cas. 246 (N.W.T.). If the notice is served on the justice for the respondent it must shew on its face that it is for the respondent, *Canadian Society v. Lauzon*, 4 Can. Cr. Cas. 354 (Que.) A notice of appeal neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient, though it appears that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor. *Hostetter v. Thomas*, 5 Can. Cr. Cas. 10, (N.W.T.).

[SUPREME COURT OF THE NORTH-WEST
TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, WETMORE, MCGUIRE AND SCOTT, JJ.

THE QUEEN v. CADDEN.

*False pretences—False pretence by conduct—Pretence by another in his presence
—Fraudulent intent of both—Cr. Code, sec. 358.*

1. A person who is present when a false representation is made by another person acting in conjunction with him, and who knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences.

DECIDED: December 9, 1899.

CROWN case reserved by WETMORE, J. The accused was charged before him, first, with having on January 25th, 1898, unlawfully and with intent to defraud by false pretences, obtained from Dorothy Mapleton a sum of money, to wit \$14.95, and, second, with having on the same day unlawfully and with intent to defraud by false pretences through the medium of David J. O'Keefe, obtained from Dorothy Mapleton a sum of money, to wit \$14.95. The accused pleaded not guilty and was tried in a summary way and was convicted.

The facts were found by the trial Judge as follows:—

One David J. O'Keefe brought an action under the small debt procedure against Dorothy Mapleton, and a summons was issued under that procedure on December 8th, 1897. The claim was for \$35.95 for goods sold and delivered and interest until judgment, and there was a memorandum on the writ of summons that the plaintiff's claim was \$35.95 and interest, and that the costs (exclusive of sheriff's fees) were 85 cents, and judgment by default was duly signed for debt \$35.95, costs \$1.35 and interest 18 cents; total, \$37.48. The costs included in the judgment were made up of clerk's fees for summons and copy, 85 cents, and sheriff's fees for service of summons, 50 cents. On January 21st, 1898, an execution was issued on this judgment against Dorothy Mapleton, and was delivered the same

day by David J. O'Keefe to accused, who was the bailiff of the deputy sheriff, but who had no authority to execute a writ of execution unless a warrant to do so was issued to him signed by the deputy sheriff. The writ of execution in question never passed through the deputy sheriff's office or came to his knowledge, and no warrant was ever issued to accused to execute it. The writ of execution was indorsed with a direction to the deputy sheriff to levy, in addition to the amount of the judgment (\$37.48) and poundage and incidental expenses, 50 cents for clerk's fee for entering judgment, and 50 cents for clerk's fee on issuing execution. On the evening of January 25th, 1898, the accused met Dorothy Mapleton and produced the execution in question and threatened to go out to her place, about thirty miles distant, the following day and seize under the execution. She informed the accused that she had sent the money by post-office order to the deputy clerk of the Court, and warned him that if he went out to her place and seized he would do so at his peril. The accused persisted in his threat to go to make the seizure. Dorothy Mapleton had, in fact, forwarded to the deputy clerk \$36.80, which was the amount of the claim and costs as appeared by memorandum on the writ of summons, and this amount was received by the deputy clerk on January 25th, 1898.

In consequence of accused persisting in his threat to go out and seize, Dorothy Mapleton went to the residence of O'Keefe the same evening in order to induce him to prevent the accused going out to seize. She then informed O'Keefe that she had sent the \$36.80 to the deputy clerk. O'Keefe was satisfied that she had remitted this money as stated, and recognized it as a payment properly made on account of the judgment. He refused, however, to withdraw the execution, claiming that there were more expenses attached to it and that there were more costs to pay, and he stated that such costs would probably be about \$15. Dorothy Mapleton then requested O'Keefe to go with her and ascertain what the amount of these costs were and she would pay them under protest. They accordingly started

out together; she going to her boarding house and O'Keefe going in search of accused. Shortly after this and on the same evening O'Keefe and the accused appeared at Dorothy Mapleton's boarding house and saw her there. O'Keefe, in the presence and hearing of accused, told her that she had \$14.95 more costs to pay, and she paid the amount to O'Keefe in the presence of the accused. The accused and O'Keefe then left the boarding house, and O'Keefe paid the accused \$10, a portion of the \$14.95 so received by him from Dorothy Mapleton.

At the time this representation was made to Dorothy Mapleton and she paid the \$14.95, there was \$1.68 actually due by her under the execution, and the amount exacted from her was therefore \$13.27 more than she was legally liable to pay.

O'Keefe knew, when he made the representation that there was \$14.95 costs to pay, that accused had not made any seizure under the execution, and he and the accused both knew that no fees or costs were payable under the execution for sheriff's fees, and that the only amount really payable by Dorothy Mapleton was the difference between the amount paid by her to the deputy clerk and the amount of the judgment with clerk's fees of signing judgment and issuing execution added. O'Keefe's statement to Dorothy Mapleton that she had \$14.95 more costs to pay was absolutely false, and it was known to both O'Keefe and to the accused to be false, and was made with the fraudulent intent on the part of both O'Keefe and the accused to induce her to act upon it. The statement constituted the false pretence upon which accused was found guilty and convicted. There was no evidence whatever that the accused himself made this false statement to Dorothy Mapleton. On the contrary, the evidence was that it was made by O'Keefe and not by him. There was no *direct* testimony that the accused instigated O'Keefe to make the false statement. O'Keefe swore that the whole \$14.95, which he stated to Dorothy Mapleton was payable, was made up of sheriff's fees which the accused represented were payable, and that accused had given him a statement in writing shewing how this amount was made up, which

statement he had lost. The trial Judge did not believe O'Keefe as to this, but stated that there was no evidence produced which satisfied him as to what took place between O'Keefe and the accused between the time that Dorothy Mapleton and O'Keefe separated and the time that O'Keefe and accused appeared at her boarding house, but he inferred that accused was a party to the false pretence and to the fraudulent intent from the facts that he appeared at her boarding house with O'Keefe; that he heard the false statement made; that he knew it was false; that he saw Dorothy Mapleton pay the money and O'Keefe receive it; and that he received part of what was paid from O'Keefe.

The following questions of law were reserved for the opinion of the Court:—

(1) Was the false statement so made by David J. O'Keefe to Dorothy Mapleton, upon which the conviction was made, under the circumstance a false pretence within the meaning of sec. 358 of the Criminal Code, 1892?

(2) If it was, was the accused liable to conviction inasmuch as he did not himself actually make such false statement to Dorothy Mapleton?

(3) Was the trial Judge justified in law in finding that accused was a party to the making of such false statement to Dorothy Mapleton, and that it was made with a fraudulent intent on his part?

L. Thomson, for the Crown.

No one for the accused.

REGINA, N.W.T. December 9, 1899.

The judgment of the Court was delivered by

ROULEAU, J.:—A false pretence is a representation either by words or otherwise of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the

person to whom it is made to act upon **such** representation. (Crim. Code, s. 358.)

According to the facts of this case **there** cannot be any doubt that a false representation was made by O'Keefe to Dorothy Mapleton as to the amount of money still due, and that he made that representation for the purpose of obtaining fraudulently a sum of money which he knew was not due, and that the said false representation was made to induce Dorothy Mapleton to pay the said sum of money.

In *Reg. v. Woolley*, 3 Car. & K. 98, it was decided that the secretary of an Odd Fellows' lodge, whose duty it was to receive money for the members at lodge hours, but not at other times, **was** guilty of false pretence because he falsely represented to one member that he owed a sum of 13s. 9d., which he made him pay, while he owed only 5s. Alderson, B., said, "If a man represents as an existing fact that which is not an existing fact, and so gets your money, that is a false pretence." Lord Campbell remarked, "It seems that the Legislature meant to prevent such gross frauds as may easily be perpetrated, though an enquiry might easily be made."

Therefore I have no doubt that the first question should be answered in the affirmative.

But it was contended that if O'Keefe was guilty of that offence, Cadden, the accused, could not be convicted, because it is of evidence that he never made any false representation to Mapleton.

Although there is no evidence that he made any false representation himself, still it was found by the learned trial Judge that he **was** present when the false statement was made, that he knew it to be false, and that he got part of the money so fraudulently obtained. In *Reg. v. Young*, 1 Leach C.C. 505, where several persons were indicted for obtaining money under false pretences, it was objected that although they were all present when the representation was made to the prosecutor, yet the words could not be spoken by all, and one of them could not be affected by words spoken by another, but that each was

answerable for himself only, the pretence conveyed by words being, like the crime of perjury, a separate act in the person using them. The Court of King's Bench, however, held, that as the defendants were all present, acting a different part in the same transaction, they were guilty of the imposition jointly.

It has been laid down as a principle in *Reg. v. Moland*, 2 Moody C.C. 276, and in *Reg. v. Kerrigan*, L. & C. 383; 9 Cox C.C. 441, that on an indictment for obtaining money under false pretences, a party who has concurred and assisted in the fraud may be convicted as principal, though not present at the time of making the pretence and obtaining the money.

It seems that the above authorities are very much in point with this case, so that the accused, Cadden, was liable to conviction, and the learned trial Judge was justified in law in finding that Cadden was a party to the making of such false statement to Mapleton, and that it was made with a fraudulent intent on his part. The two last questions are therefore answered in the affirmative.

Conviction affirmed.

Note: *False pretence by conduct—Cr. Code, sec. 358.*

A false pretence need not be in words or in writing but may be in the conduct and acts of the accused, *Regina v. Létang* (1899), 2 Can. Cr. Cas. 505. (Würtele, J., Montreal.) In that case a debtor had made a judicial abandonment for the benefit of his creditors whereby his property became vested in another, and, knowing that he was no longer entitled to receive the rent, he presented himself afterwards as the landlord to a tenant of the property and received the rent as he had formerly been accustomed to do. It was held that he was properly found guilty of a false pretence by his acts and conduct.

A workman employed by clothiers was to keep an account of the number of shearmen employed, and the amount of their earnings and wages which he was weekly to deliver in, in writing, to a clerk who paid him the amount. He delivered in a false memorandum of the total alleged wages of shearmen for the week giving no details and received the amount. The prisoner was not allowed to draw any sum that he thought fit on account but only so much as had been actually earned by the shearmen. It further appeared that the prisoner was required to keep a book with the names of the men employed and of the work they had done, and that he had entered in this book the names of several men who had not been employed as having earned various sums of money, and had overstated the amount of

Note—Continued.

work done by those who were employed so as to make out the total mentioned in the memorandum handed in by him. It was held that as the prisoner would not have obtained the custody of the particular sum of money but for the false memorandum, he was properly convicted, distinguishing it from a case of money paid generally on account. *Rez v. Witchell*, 2 East P.C. 830.

In *Regina v. Eagleton* (1855), 1 Dearsly C.C. 515, 6 Cox C.C. 559, the defendant contracted in writing with the guardians of a parish to supply and deliver for a certain term to the out-door poor, at such times the guardians should direct, loaves of bread, each of a specified weight. The guardians were, during such period, to pay certain prices for the bread so supplied, on being furnished with a bill of particulars. On a poor person applying for relief, the relieving officer gave the applicant a ticket for "bread, one loaf," the presentation of which to the defendant entitled the applicant to receive a loaf. The defendant received the tickets and gave to the poor persons presenting them loaves of bread deficient in weight as he well knew. The defendant would then return the tickets in the following week with a statement in writing of the number of loaves he had supplied, and the relieving officer would credit the defendant's account with the guardians with the amount, and the money would then be paid to him at the time stipulated in the contract. Tickets were returned by the defendant and he was credited with same, but the fraud was discovered before the stipulated time for payment of the money had arrived. The jury found that the defendant intended to defraud the out-door poor and that by returning the tickets to the relieving officer he intended to represent that he had delivered the loaves mentioned in them of the weights contracted for. It was held that, as no false weights or tokens had been used, the defendant could not be convicted as for a common law misdemeanor in supplying to the poor persons loaves deficient in weight with intent to injure and defraud such persons and to deprive them of proper sustenance and endanger their healths. But it was held that the defendant was properly convicted on other counts, of attempting to obtain money by false pretences, his obtaining the credit in account being the last act depending on himself towards obtaining the money. Parke, B., in delivering the judgment of the court (Jervis, C.J., Parke, B., Maule, J., Wightman, J., Erle, J., Platt, B., Williams and Crompton, J.J.) said:—"We think that the contingency of the whole sum due to him, being subject to deductions in a future event, does not the less make the obtaining credit an attempt to obtain money, if it would be so without that contingency; but our doubt has been whether the obtaining that credit, though undoubtedly a necessary step towards obtaining the money, can be deemed an attempt to do so? The mere intention to commit a misdemeanor is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanor are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit, but acts immediately connected with it are; and if, in this case, after the credit with the relieving officer for

Note—Continued.

the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, as the making out a further account, or producing the vouchers to the board, we should have thought that the obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered as an attempt. The receipt of the money appears to have been prevented by a discovery of the fraud by the relieving officer; and it is very much the same case, as if, supposing rendering an account to the guardians at their office, with the vouchers annexed, were a preliminary necessary step to receiving the money, the defendant had gone to the office, rendered the account and vouchers, and then been discovered, and the money consequently refused."

It is a fraudulent obtaining of goods by false pretences if delivery of the goods was obtained by the purchaser giving in payment his cheque upon a bank with which he has no account, or, even where there is an account, if there are insufficient funds there to meet it and he knows that it will not be paid. *R. v. Jackson*, 3 Camp. 370. The giving of a cheque on bankers is a representation of authority to draw, or that it is a valid order for payment of the amount. *Regina v. Hazelton*, L.R. 2 C.C.R. 134.

If the money is parted with from a desire to secure the conviction of the prisoner there is no obtaining by false pretences. *Regina v. Mills*, Dears. & B. 205, 26 L.J.M.C. 79; *Regina v. Gemmell*, 26 U.C.Q.B. 315. The false pretence must have been the inducing cause to the defrauded party to part with his property. *Ibid.*

If a person offers in exchange for goods the promissory note of another, he is to be taken to affirm, although he says nothing, that the note has not to his knowledge been paid either wholly or to such an extent as to almost destroy its value. *R. v. Davies*, 18 U.C.Q.B. 180.

Where an attorney who had been struck off the rolls obtained money out of court under such circumstances as amounted to a false pretence practised on the court, his object being to obtain the fund that he might retain his costs out of it, it was held that it was none the less a false pretence by reason of the fact that the accused had intended to pay and did in fact pay over the balance to the person properly entitled. *Regina v. Parkinson*, 41 U.C.Q.B. 545.

[COURT OF QUEEN'S BENCH, QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE BABY, BOSSE, BLANCHET, HALL AND WÜRTELE, JJ.

THE QUEEN V. HOGLE.

Fraudulent conversion—Theft by agent—Continuity of acts—Offence completed in another district—Jurisdiction of magistrate—Code secs. 308, 538, 553, 640.

1. The offence of fraudulent conversion of the proceeds of a valuable security, mentioned in Code sec. 308, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district.

DECIDED: March 18, 1896.

WÜRTELE, J.:—The defendant, Lorenzo Judson Hogle, who resides at Stanbridge Station, in the district of Bedford, is accused of having fraudulently converted to his own use the proceeds, amounting in capital and interest to \$82.97, of a promissory note which was due by one Elzear Tougas, who also resides at Stanbridge Station, and which had been intrusted to him in the parish of St. Sebastian in the district of Iberville, by Narcisse Demers, who resides in the last mentioned place, on the express condition of collecting it and of then paying over the proceeds to him.

An information was laid against the defendant before the district magistrate at St. Johns, in the District of Iberville, and a warrant was issued on which he was arrested at Stanbridge Station and brought to St. Johns. There a preliminary enquiry was held, and the defendant was committed for trial in the District of Iberville. A true bill was soon afterwards found and the defendant stood his trial and was found guilty.

The defendant then moved in arrest of judgment on the ground that the fraudulent conversion had taken place in the District of Bedford, where he at that time and still resided,

and therefore that the Court of Queen's Bench, sitting on the Crown side in the District of Iberville, had no jurisdiction over the case.

The trial Judge, the Hon. A. N. Charland, suspended sentence and reserved the following question of law for the opinion of the Court of Appeal:—

Whether under the circumstances of the case the Court sitting in the District of Iberville or the Court sitting in the District of Bedford has jurisdiction in the matter.

The trial Judge in the case which he has submitted, states that it was in evidence that the promissory note was made at Pike River, in the District of Bedford, that the maker resided there, that it was paid to the defendant in that district, but that it had been entrusted by the prosecutor to the defendant for collection in the Parish of St. Sebastian in the District of Iberville, where the prosecutor resided.

The question relates to the jurisdiction of the Court in the different districts where it sits.

By sec. 538 of the Criminal Code, the Court of Queen's Bench has general power to try all indictable offences; but under the provincial law organizing the Court it sits and holds terms on the Crown side, that is for the exercise of its criminal jurisdiction, in each of the districts into which the province is divided. Then sec. 640 of the Criminal Code enacts that the Court in any district shall be competent to try any offence, wherever committed, if the accused is found, or apprehended, or is in custody within the district, or if he has been committed for trial in the district. Whenever, therefore, the accused has been committed by a magistrate or justice of the peace for trial before the Court in any district, the Court sitting in such district has jurisdiction to try the case.

In the present matter the defendant was committed by the district magistrate for trial before the Court sitting in the District of Iberville, and the Court sitting there had therefore power to try the case, if the committal was legal.

We must therefore see if it was. A motion in arrest of judgment was not, however, the proper manner to raise the question of jurisdiction, for such a motion can only avail when the indictment does not state any indictable offence, and in the present case the indictment on its face shewed one; but this irregularity in pleading is immaterial, as the defendant had the right to raise and urge the question of jurisdiction under his plea of not guilty.

By sec. 554 of the Criminal Code every justice of the peace has jurisdiction to proceed on an information laid before him when the person accused either resides or is within the district for which he has been appointed, or when a person, wherever he may be, is accused of having committed an indictable offence within his district. The general rule is that the magistrate or justice of the peace has jurisdiction either by reason of the residence or presence of the accused in his district, or by reason of the commission of the offence within its limits. There is, however, an enlargement of this general rule in sec. 553, which enacts among other provisions that when an offence is begun within one magisterial jurisdiction and completed within another, such offence may be considered as having been committed in either of them.

Section 308 of the Criminal Code, under which the information and the indictment were laid, provides that every one commits theft who having received a valuable security on terms which require him to pay over the proceeds thereof, fraudulently converts the same to his own use, or fraudulently omits to account for or pay over such proceeds. Now, in the present case the valuable security was received and the terms were agreed to in the District of Iberville, and the person to whom the accused was to account for the proceeds resides in that district, but the accused collected the money in the District of Bedford. The offence may have begun in the District of Iberville when the accused received the promissory note for collection, and may have been completed when he received the proceeds in the District of Bedford; or it may have begun in the

District of Bedford when the accused received the money, and have been completed in the District of Iberville when he omitted to account for or pay over the proceeds to the prosecutor at his residence. In both cases, under sec. 553, the offence would be considered as having been committed within the jurisdiction of the magistrate or justices in either district; and the proceedings of the district magistrate at St. Johns and the committal by him for trial in the District of Iberville were therefore regular and legal.

The offence in the present instance resembles the offence which we knew before the Criminal Code came into force, as embezzlement. In May's Law of Crimes we read at page 79: "A person may be convicted of embezzlement by the tribunals of the state in which he was entrusted with the property embezzled, although the fraudulent conversion took place in another state." To apply this quotation to our case we have only to substitute the word "district" for the word "state." Then I find a case quite analogous to the present one in 33 Maine Reports, at page 127, *The State and Haskell*: "If a person within a district receive a valuable security to be collected by him in another district and accounted for to the bailor, and do fraudulently convert the proceeds to his own use, either within or without the district where the security was delivered to him, he will be considered to have received it with a felonious intent, and may be tried in either one of the two districts. An act of fraudulent conversion, wherever committed, appears to have been regarded as evidence of an intention existing at the time of the reception to commit the crime."

In our books we find the same principle. In Archbold's Criminal Pleading and Evidence, at page 41, we read: "In indictments for embezzlement, where the money has been received in one county and the receipt denied in another county, the venue has been holden to be well laid in either county. And in this and in all other cases in which the offence is begun in one county and completed in another, the venue may be laid in either county." And in 8 English Law and Equity Reports, at

page 577, we may find the case of *Regina v. Murdoch*, wherein it was held, "Where a servant was charged in Nottingham to collect moneys for his master in Derbyshire, and after receiving such moneys did not return and pay over in Nottingham the amounts which he had received, that there was an embezzlement in Nottingham and that there was jurisdiction to try him there." The same decision was long previously given in the case of *Rex v. Taylor*, which is reported in 2 Leach's Crown Law, at page 974.

In the case of the offence mentioned in article 308, the offence does not consist of one act, but in a continuity of operation; first, the reception of the valuable security, then the collection of the proceeds, next the conversion of the proceeds, and lastly, the omission to account for or pay over such proceeds. There is a beginning, a continuation and a completion, and where the beginning is in one district and the continuation and completion are in another district, the person accused of the offence may be arrested and proceeded against in either of such districts.

We must hold, therefore, in the present case, that the Court sitting in the District of Iberville, to which the accused had been committed for trial, had jurisdiction in the matter, and that no reason sufficient to set aside the conviction has been shewn.

The formal judgment of the Court of Appeal was as follows:

"After having heard counsel for the Crown and for the accused, and due deliberation had on the case transmitted to this Court from the Court of Queen's Bench, sitting at St. Johns, in the District of Iberville, (Crown side):

"It is considered and adjudged and finally determined by the Court now here, pursuant to the provisions of the Criminal Code in that behalf, that an entry be made in the record to the effect that in the opinion of this Court, the said Court of Queen's Bench, sitting at St. Johns, in the District of Iberville,

had jurisdiction to try the accused for the offence for which he had been committed for trial, and consequently that the proceedings had and taken in the said Court are regular, and that no reason hath been assigned by and on behalf of the accused sufficient to set aside the conviction in this case :

" It is therefore ordered that the said conviction be and the same is hereby affirmed and do stand in full force and effect, and that judgment be given thereon in due course by the said Court of Queen's Bench, sitting at St. Johns, in the District of Iberville."

Conviction affirmed.

J. C. McCorkill, for the prisoner.

J. L. Archambault, Q.C., for the Crown.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., HANINGTON, LANDRY AND VAN WART, JJ.

Ex parte WYMAN.

Summary proceedings—Withdrawal after evidence entered upon—Leave of magistrate—Want of certificate of dismissal—Subsequent trial on another information covering offence first charged—Concurrent prosecutions under Canada Temperance Act—Autrefois acquit—Crim. Code secs. 858, 862.

1. After the evidence has been heard in summary proceedings the justice is not bound either to convict or discharge the defendant; he may allow the prosecutor to withdraw the charge.
2. Such withdrawal may be allowed even when another information covering the same offence has been laid by the same prosecutor against the same defendant, and the determination thereof is still pending.

ARGUED : February 2, 1899.

DECIDED : April 21, 1899.

On the 20th of August, 1898, the defendant was convicted before William Dibblee, Esq., Police Magistrate in and for the town of Woodstock, in the County of Carleton, of having unlawfully sold intoxicating liquor on the 10th day of March,

1898, at the Parish of Kent, in that county, contrary to the provisions of the second part of the Canada Temperance Act.

FREDERICTON, N.B., February 2, 1899.

Gregory, Q.C., shewed cause against a rule nisi granted in Michaelmas Term last, calling upon William Dibblee, Esq., Police Magistrate of the town of Woodstock, to shew cause why a writ of certiorari should not issue to remove the conviction with the view of quashing the same.

F. B. Carvell, in support of the rule.

The facts and grounds upon which the rule nisi was granted will sufficiently appear in the judgments of the learned Chief Justice and Mr. Justice Landry.

FREDERICTON, N.B., April 21, 1899.

TUCK, C.J.:—I find appended to the proceedings returned by the magistrate the following, namely: "Immediately after Cornelius Gee was called as a witness, on the 22nd of June last past, and evidence given, before any other proceedings were taken, Mr. Murphy asked to have the case dismissed on the grounds that an information had been made by Banfur Colpitts against the defendant on the 14th day of April last past, and that the said Cornelius Gee had been called as a witness in that matter, and after the defendant had made his defence the said case had been dismissed, and Mr. Murphy now demands a certificate of dismissal in that case. The presiding justice states that he did not dismiss that case but merely allowed the prosecutor to withdraw it. I therefore cannot give a certificate of dismissal, as no dismissal was made. WILLIAM DIBBLEE, P.M."

The only ground upon which, it is argued, that a certiorari should go, and this conviction be quashed, is, that it was the duty of the magistrate to dismiss the first case. In arguing this point the learned counsel for the defendant cited sec. 858 of the Criminal Code of Canada, which enacts that "The justice having heard what each party has to say, and the

witnesses and evidence adduced, shall consider the whole matter, and unless otherwise provided, determine the same, and commit or make an order against the defendant or dismiss the information as the case may be."

In my opinion, from what appears by the return, there was no dismissal of the case, and the magistrate was not called upon to determine the charge for selling on the 1st day of April, 1898.

It seems that there were two informations. The first was made on the 14th day of April, which charged a sale on the 7th of April. The hearing of this charge was adjourned until the 18th of May. Afterwards there was a second information the first having been withdrawn. Cornelius Gee gave evidence on both informations, and the defendant was convicted for selling on the 10th day of March, 1898.

In my opinion the magistrate acted entirely within his rights in allowing the first information to be withdrawn. There was no adjudication upon it, and there is ample evidence to shew that the defendant was rightly found guilty.

I think that the rule nisi must be discharged.

HANNINGTON and VANWART, JJ., concurred.

LANDRY, J. (dissenting):—On the 14th day of April, 1898, an information for selling liquor contrary to the Canada Temperance Act "On or about the 7th day of April" was laid against Wyman; a summons issued on the same day, describing the same offence, and on the 18th of May one Gee gave evidence in these proceedings as to a sale on the 10th of March. The proceedings were adjourned from time to time to the 22nd day of June. On that day, the 22nd, the prosecutor asked to withdraw the information and was allowed to do so by the presiding justice. The defendant requested to be allowed costs for his witnesses but was refused.

On May 19th, and while the proceedings above referred to were pending, and one day after Gee had given evidence of the sale having taken place on the 10th of March, another information was laid by the same prosecutor, and a summons was issued

thereon for selling "On or about the 1st day of April." The first hearing in this last case—being the case in which the conviction now sought to be set aside was obtained—was had on the 8th of June, and one witness was examined. It is well to note that on the same 8th of June the Court had the case first above mentioned formally adjourned to another day, and the hearing of this case went on. In fact the two cases were more than once adjourned to the same day till the 22nd of June, when the first mentioned one was withdrawn, and when the second one was proceeded with by offering and giving the same evidence, by the same witness, as to the sale on the 10th of March as was given on the 18th day of May in the first case, now withdrawn. From the evidence it is impossible to say why the second case was ever commenced, and it is equally difficult to conjecture why a conviction could not as readily have been asked for and expected in the first case, on the evidence given on the 18th day of May, as was obtained on the same evidence in the second case.

Section 858 of the Criminal Code enacts that "The justice having heard what each party has to say, and the evidence adduced, shall consider the whole matter, and unless otherwise provided determine the same and convict or make an order' against the defendant or dismiss the information or complaint.' Section 862 provides that if the justice dismisses the information he may when required to do so, make an order for dismissal and give a certificate thereof, which certificate, upon being produced, shall be a bar to any subsequent information for the same matter. In this case there can be no doubt that the second information, as proven by the evidence, was for the same matter as the first. The defendant sought to avail himself of the failure of the first information as a bar to the second, but he had not obtained a certificate of dismissal, though he had asked for one, and the justice had refused it on the ground that the first information had not been dismissed.

With this state of facts it seems very doubtful whether the justice had the right to refuse the dismissal and certificate. He

had jurisdiction, evidence had been given, the defendant asked for judgment in his favour by requesting costs for his witnesses; he subsequently asked for a dismissal and certificate, and I cannot relieve my mind from absolute doubt of the right of the informant to withdraw under such circumstances without making such withdrawal equivalent to a dismissal. It being the same justice who issued the summons, presided over both cases, heard all the evidence, and was well aware of all the facts, I do not think he could have convicted in the second case even if a certificate could not be produced. It was his failure to give a certificate when I think he should have adjudicated and given one in case he did not convict, that prevented the defendant from establishing a complete defence by the production of such a certificate. In *Bradshaw v. Vaughton*, 30 L.J. C.P. 93, the informant gave notice that he withdrew, but the justice granted a certificate of dismissal at the request of the defendant. Erle, C.J. says: "It is held that the informant cannot withdraw, and that the defendant has a right to a decision; and that if the informant says he withdraws, the case is heard and the information is dismissed, and the power to certify is given, if the magistrates, in their discretion, choose to grant it."

Under these circumstances, and with this view of the law, I regret I cannot agree with my brethren on the Bench.

Rule discharged. (LANDRY, J., dissenting.)

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE STREET, J.

THE KING v. MORGAN.

Summary Trial—Theft—Conviction for attempt—Description of offence—Original conviction in lieu of warrant of commitment—Order for further detention.—Code secs. 752, 783.

1. It is competent for a magistrate upon the summary trial before him of a prisoner charged under sec. 783 (a) of the Criminal Code with having committed theft, to convict him of the offence of attempting to commit it provided for in sec. 783 (b).
2. A conviction on summary trial that the accused "attempted to pick the pocket" of a person namely, sufficiently describes the offence of attempting to commit theft.
3. Where the conviction itself was lodged with the gaoler as his authority for the detention in lieu of a warrant of commitment, the Judge before whom the prisoner is brought upon *habeas corpus* may properly order the further detention of the prisoner for a limited time until a warrant in due form can be obtained from the magistrate.

ARGUED: September 24, 1901.

DECIDED: October 12, 1901.

THE prisoner on the 19th June, 1901, was charged before the police magistrate for the town of Barrie that he did on the 15th June, 1901, "pick the pocket of a woman named Salter and did steal from her person a sum of money." The prisoner elected to be tried summarily under the group of sections of the Criminal Code beginning with sec. 782, and was remanded for trial until the 24th June, 1901, and on that day he was convicted of having "attempted to pick the pocket" of Margaret Salter, and was sentenced "to be imprisoned in the Central Prison at Toronto and there kept at hard labour for the term of six months." He was taken to the Central Prison, and the conviction, which recited the charge and the prisoner's election to be tried summarily and his conviction as above, signed and sealed by the magistrate, was lodged with the gaoler at the Central Prison as the warrant for his detention there.

Writs of *habeas corpus* and *certiorari* having been issued, the depositions taken before the magistrate upon the trial, as

well as the information, were brought up on the *certiorari*, and the gaoler of the Central Prison brought up the conviction with the prisoner as his warrant for detaining him.

On the 24th September, 1901, *E. E. A. DuVernet* moved for the prisoner's discharge, upon the following grounds: (1) that, being charged with stealing from the person and having elected to be tried summarily for that offence, he could not be convicted of the attempt merely; (2) that no proper warrant of commitment had been issued, and that no defect could be remedied after the prisoner had been brought before the Court by *habeas corpus*; and (3) that no offence was described in the conviction.

J. R. Cartwright, K.C., for the Crown, shewed cause.

TORONTO, October 12, 1901.

STREET, J.:—The only objection as to which I have any doubt is the first, viz., that the prisoner, being charged with the offence of larceny from the person, was convicted of an attempt to commit it. My doubts have been caused by the fact that in sec. 783* of the Code the offence of theft and of attempting to commit theft are the subjects of separate sub-sections, and there is no section applicable to summary trials of indictable offences before magistrates which seems directly to give to the magistrate trying them the powers given by secs. 711 and 774 to other tribunals under the same circumstances, that is to say, the power to convict of an offence included in, but not precisely the same as, that charged. I think, however, that the charge of the lesser offence must necessarily be taken to be included in the greater, and that in a summary trial of this kind a prisoner charged with commit-

* 783. Whenever any person is charged before a magistrate, (a.) with having committed theft . . . and the value of the property alleged to have been stolen . . . does not, in the judgment of the magistrate, exceed ten dollars; or (b.) with having attempted to commit theft; . . . the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

ting a theft may be convicted of attempting to commit it, just as one charged with committing an aggravated assault might be convicted of a common assault. This view is strongly supported by the effect given to a conviction or a dismissal of the charge by secs. 798 and 799;† for a contrary view would enable a prisoner charged with theft, and tried under the group of sections now under consideration, to escape scot free, however clearly an attempt to commit the offence were proved.

In my opinion, therefore, it was competent for the magistrate trying the prisoner charged under sub-sec. (a.) of sec. 783 with having committed theft, to convict him of the offence of attempting to commit it provided for in sub-sec. (b.)

I think the offence of theft from the person is sufficiently described in popular language as picking the pocket of a person, and the evidence before me amply supports the conviction.

I think there should have been a warrant of commitment, although the Code is silent upon the point, and no form is given. The conviction in the gaoler's hands is an extremely informal warrant; but, there being an offence proved and a proper conviction for the offence, and absolutely no merits in the application, I exercise the power conferred upon me by sec. 752* of the Code, and direct that the prisoner be further detained under the present proceedings, and that the police magistrate before whom he was convicted do issue a proper

† 798. Every conviction under this part shall have the same effect as a conviction upon indictment for the same offence.

799. Every person who obtains a certificate of dismissal or is convicted under the provisions of this part, shall be released from all further or other criminal proceedings for the same cause.

* 752. Whenever any person in custody charged with an indictable offence has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari*, *habeas corpus* or otherwise, to have the legality of his imprisonment inquired into, such judge or court may, with or without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice to take any proceedings, hear such evidence, or do such further act as in the opinion of the court or judge may best further the ends of justice.

warrant of commitment and lodge it with the gaoler of the Central Prison on or before the 1st day of November, 1901, and that, if the same be not so lodged before that date, the prisoner be at liberty, if so advised, to apply for a further writ.

In the meantime I am of opinion that the prisoner is not entitled to be discharged from custody.

Discharge refused.

Note: *Invalid commitment—Habeas corpus—Regularity of conviction—Order for detention—Crim. Code sec. 752.*

It was held in *Re Timson* (1870), L.R. 5 Exch. 257, that where a prisoner is brought up on a writ of habeas corpus, and the return shews a commitment bad on the face of it, the Court will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up, and amending the commitment by it in a case where the magistrates had not brought the conviction before the Court, although served with notice and appearing by counsel.

In *R. v. Fife* (1889), 17 Ont. R. 710, a warrant of commitment for trial, issued in a preliminary enquiry upon a charge of having "wilfully and maliciously" burned down a fence, was quashed by MacMahon, J., as insufficient because it did not charge also that the act was done "unlawfully." The prosecution was there taken under the Malicious Injuries to Property Act, R.S.C. 1886, ch. 168, sec. 58, under which section the injury must have been done "unlawfully and maliciously" in order to constitute an offence thereunder.

In *R. v. Chaney* (1838), 5 Dowl. 281, the commitment was likewise defective in not alleging matter essential to the offence, and the right to certiorari on the part of the accused had been taken away by statute, but not the right to habeas corpus. The Court held that unless the Crown brought up the conviction, the commitment, although defective, would be considered as a true recital of it.

Where, however, the application is one upon affidavits for a writ of habeas corpus, the usual practice is to require that the conviction be brought up, before the Court will take any notice of a defect in the warrant; and for this purpose a certiorari is taken to bring up the record, and a writ of habeas corpus to bring up the defendant. *R. v. Taylor*, 7 D. & R. 622.

The inclusion of the process of certiorari in Code sec. 752, *supra*, leads to the inference that the powers thereby conferred are to apply as well after as before conviction, and that a person convicted still remains a person "charged" with an indictable offence.

If the evidence as to the commission of the alleged offence is conflicting, and the term of imprisonment imposed by the conviction is in excess of that authorized by law, the Judge before whom the case is brought on habeas corpus should not exercise the powers conferred by sec. 752 of ordering further detention, but should discharge the prisoner. *R. v. Randolph* (1900), 4 Can. Cr.

Note—Continued.

Cas. 165 (Ont.). The warrant of commitment can be amended only where there is a "valid conviction to sustain the same." Code sec. 800.

If the conviction is by a court of record having general jurisdiction of the offence charged, habeas corpus will not lie. *Re Sproule*, 12 Can. S.C.R. 140; *Re D. C. Ferguson*, 24 N.S.R. 106. In such case the right to hold the prisoner is founded on the fact of a sentence having been passed by such a Court. *Ibid.* A decision of a County Court Judge's criminal court under the Speedy Trials procedure can only be reviewed by reserved case or appeal as provided by the Code, and not by habeas corpus. *R. v. Burke* (1898), 1 Can. Cr. Cas. 539 (N.S.).

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE BITCHIE, J., IN CHAMBERS.

THE KING v. McLEAN.

Indecent assault—Arrest without warrant—Entry in police charge book—Consent to summary trial—Want of sworn information—Jurisdiction of magistrate—Code secs. 22, 259, 552 (3), 558, 783 (d).

1. Where the accused found committing a criminal offence is arrested without warrant by a peace officer, and on being brought before a police magistrate a written charge not under oath is read over to him, and he thereupon consents to be tried summarily, the police magistrate has jurisdiction to try the case although no information has been laid under oath.

ARGUED: November 1st, 1901.

DECIDED: November 2nd, 1901.

Motion on the return of a habeas corpus for the discharge of the above named defendant out of custody in the city prison, where he was confined on a warrant awarding six months imprisonment, for that he did in the City of Halifax "on the 15th day of August, A.D. 1901, unlawfully and indecently assault Annie Doyle, a female."

John J. Power, for the prisoner.

F. B. Scott, for the Attorney-General of Nova Scotia.

HALIFAX, November 2nd, 1901.

RITCHIE, J.—The said Duncan J. McLean and one William Bird were convicted before the stipendiary magistrate of the City of Halifax of an indecent assault upon Annie Doyle; and under the provisions of part 55 of the Criminal Code, entitled "Summary Trials of Indictable Offences," the said Duncan McLean was sentenced to six months imprisonment in the city prison.

This application is made for his discharge on the following grounds:

(1). Because the accused was not informed as to his right to be tried before another court.

(2). Because no information was laid before the magistrate.

The facts disclosed by the record sent up at the instance of McLean's solicitor are as follows:

The alleged assault was committed in the house of Annie Doyle, who raised an alarm which brought the police to her door. The door was fastened, but at her request the police broke it open and found McLean and Bird in the house, whom they at once arrested and took to the Police Station. An entry was made in the Police Charge Book for the City of Halifax that McLean and Bird were in custody for assaulting Annie Doyle, in her house, in the City of Halifax.

When the magistrate commenced to investigate the charge and heard part of the evidence he abstained from deciding the case under "The Summary Conviction Act," and caused the charge to be amended to read as follows:

"That Duncan J. McLean and William Bird did, in the City of Halifax, on the 15th day of August, A.D. 1901, unlawfully and indecently assault Annie Doyle, a female."

This charge having been read over to the accused, McLean, he consented in writing that the charge should be tried summarily before the Stipendiary Magistrate and pleaded "not guilty." The trial then proceeded under part 55 of the Code,

and resulted in the conviction of the said McLean of the aforesaid charge.

There is also an affidavit of Robert E. Finn, that before McLean pleaded to the charge, as above stated, the magistrate informed him of his right to be tried by a jury, and he afterwards signed the consent to be tried summarily.

The police had the right under the Code to arrest the accused without a warrant, and when he consented to be tried summarily for the aforesaid charge of committing an indecent assault, the magistrate had complete jurisdiction to deal with the case.

The case of *The Queen v. Ettinger*, 3 Can. Cr. Cas. 387 (N.S.), which was a summary conviction involving the jurisdiction of the justices who tried it, has, I think, no bearing whatever upon this case.

It is questionable too, whether habeas corpus would lie to discharge a prisoner convicted on a summary trial for an indictable offence where there is a remedy by appeal, but I do not decide the case upon this ground.

In my opinion the provisions of the Code in this case have been fully complied with, and the said Duncan J. McLean is not entitled to be discharged.

Discharge refused.

[COURT OF QUEEN'S BENCH, QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE BABY, BOSSÉ, BLANCHET, HALL AND WÜRTELE, JJ.

THE QUEEN v. CONNORS et al.

Evidence—Several defendants—Calling co-defendant as witness—Co-defendant a competent but not compellable witness—Canada Evidence Act, 1893, secs. 4 and 5.

1. One co-defendant cannot be called as a witness by another co-defendant and compelled to give evidence, but a co-defendant may testify if he chooses to do so.

DECIDED: November 21, 1893.

THREE prisoners, of whom John Connors was one, were being tried jointly before Mr. Dugas, Judge of the Sessions, for burglary. The counsel of Connors asked to be allowed to call the other two defendants as witnesses on his behalf, and the Judge thereupon reserved the question whether in law he had the right to call his co-defendants, and stated the following case for the opinion of the Court of Appeal:—

“Les accusés sont à subir leur procès devant la cour des sessions pour vol avec effraction.

“L'un d'eux est représenté par avocat et demande à faire entendre ses co-accusés comme témoins.

“La chose peut-elle se faire, soit que les co-accusés y consentent ou n'y consentent pas?”

Counsel were heard for and against the application.

MONTREAL, November 21, 1893.

WÜRTELE, J.:—By the common law a person who is charged with the commission of an offence is not competent or compellable to give evidence for or against himself, and several persons so charged and jointly on their trial cannot be called as witnesses for or against themselves or each other. Stephen in

his Digest of the Law of Evidence, article 108, says: "In criminal cases the accused person and every person jointly indicted with him is incompetent to testify." It is also a rule of the common law that no party or witness can be compelled to give evidence which would tend to criminate him and expose him to punishment. Taylor on Evidence, sec. 1453, thus shortly lays down this rule: "No party can be compelled to discover that, which, if answered, would tend to subject him to any punishment, penalty, or forfeiture. Neither will a witness be forced to answer questions of a like tendency."

In this country, however, the law on this subject has been recently modified by the Canada Evidence Act, 1893. Sec. 4 enacts that "every person charged with an offence, shall be a competent witness, whether the person so charged is charged solely or jointly with any other person," and adds: "The failure of the person charged to testify shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury." Then sec. 5 enacts that "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him; provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him."

A person is either competent or incompetent to be a witness, and may either testify voluntarily or be compelled to do so; but there is a difference between being competent and being compellable as a witness. Under the rule of the common law a person on trial for an offence was neither competent nor compellable to give evidence for or against himself, and co-defendants on trial for an offence could not be called as witnesses for or against themselves or each other. The new law only declares that such persons shall be competent witnesses, and the old law which declares that they are not compellable to give evidence therefore remains in force.

The old law protected persons giving evidence from answering questions which tended to criminate them, while the new

law declares that they are no longer excused from doing so, but adds that their testimony shall not be used or receivable in evidence against them in criminal proceedings which may afterwards be instituted against them. When a person on trial claims the right to give evidence on his own behalf, he comes under the ordinary rule as to cross-examination in criminal cases. He may be asked all questions pertinent to the issue, and cannot refuse to answer those which may implicate him. Under the new law, which protects him from the effect of his evidence in proceedings subsequently brought, but does not do so in the case in which the evidence is given, he may be convicted out of his own mouth. He cannot be compelled to testify, but when he offers and gives his evidence he has to take the consequences. And when he does not see fit to tender his evidence, the law protects him in the position he takes, and declares that his failure to testify shall not be made the subject of comment, which might prejudice him in the minds of the jury.

The old and universally recognized rule of the English criminal law—that no one can be compelled to criminate himself—still prevails, and therefore in criminal cases no person accused of an offence, whether indicted and tried alone or jointly with others, can be required to give evidence, although he may do so of his own accord.

On the question stated and submitted to us, we are unanimously of opinion that one co-defendant cannot be called by another co-defendant and compelled to give evidence, but that he may tender his evidence if he sees fit.

The decision of the Court is as follows:—

“After having heard counsel as well for the Crown as on behalf of the prisoner, and due deliberation had on the case transmitted to this Court from the Court of Special Sessions of the Peace sitting at Montreal, and on the question therein set forth;

“It is considered and adjudged and finally determined by the Court now here, pursuant to the provisions of the Criminal

Code, that an entry be made in the record to the effect that in the opinion of this Court the co-defendants of the said prisoner cannot be compelled or called upon to give their testimony, but may tender their evidence."

J. L. Archambault, Q.C., for the Crown.

Ernest Desrosiers, for the prisoner.

[COURT OF QUEEN'S BENCH, QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE SIR ALEXANDRE LACOSTE, C.J., BOSSÉ, BLANCHET AND HALL, JJ., AND WHITE, J., *ad hoc*.

THE QUEEN v. TESSIER.

Theft by municipal officer—Collection of unauthorised rate—Receiving by virtue of employment—Fraudulent appropriation—Right of ownership or of possession in party defrauded—Code secs. 305, 319 (a), 319 (c).

1. A charge against a city officer for collecting sums of money upon the pretence that they were payable to the city and not thereafter accounting for the same is not sustainable as a charge of theft, if in fact the sums collected were not payable to the city.
2. To constitute the offence of theft (Code sec. 305) or of theft by a clerk (sec. 319 (a)) or of theft by municipal employees (sec. 319 (c)) the person alleged to have been defrauded by the taking must have had a right at the time of the taking either to the ownership or to the possession of the property taken.
3. An indictment against a Government or municipal officer for theft or embezzlement under Code sec. 319 (c) would be demurrable if it did not allege that the officer had received the money by virtue of his employment, but on such being alleged and proved, the wrongful appropriation is an offence under sec. 319 (c) whether the property be public (or municipal) property or not.

MONTREAL, November 16, 1900.

The following opinion was given by

WHITE, J.—

On the 14th of April last, the city auditor made the following charge against the defendant :

"I am credibly informed, and have good reason to believe that in the city of Montreal, between the month of January, 1895, and the end of December, 1898, Germain Tessier, then being in the employ of the city of Montreal as clerk of the Bonsecours Market in this city, and said district, stole different sums, amounting to a total of \$295, of the property of the said city of Montreal."

The accused made option for a speedy trial, was tried before Judge Desnoyers and convicted. The judge, however, suspended sentence, and reserved for the opinion of this court the question whether, under the facts stated in his reserved case, the conviction is right or ought to be set aside.

It would appear from the reserved case, that the charge had been somewhat altered after the preliminary investigation, and the charge stated in the reserved case is, that the accused did, in the city of Montreal, in said district, between the year 1894 and the end of the year 1898, while being a clerk in the service of the city of Montreal, a body politic and incorporated under the laws of this province, steal divers sums of money, amounting in all to the sum of \$810, belonging to the said city.

The charge is substantially the same, varied only as to the amount, and in that the city of Montreal was more fully described as a municipal corporation. The reserved case states that the proof established that stalls in the market had been leased at fixed prices, the rents having been fixed by the Market Committee, and that when a stall became vacant by expiry of the lease, or otherwise, it was put up to auction and adjudged to the highest bidder. The bid was not made as to the amount of the rent, which had been invariably fixed as above stated, but as an amount to be once paid, to obtain the possession of the stall. The bid was called a "bonus," and when the stalls were adjudged in this manner the amount of the adjudication was regularly paid to the city as owners of the market.

That for some years past it frequently happened that the market stalls, at least those in the Bonsecours Market, of which the accused was the clerk, without having become vacant,

changed tenants. In these cases the new tenant paid the former tenant the price of his improvements and fixtures, as they might agree upon, but the new tenant was not accepted by the Market Committee, or had his name inscribed in the books of the city, except upon the condition of paying a sum, or bonus, of \$25 or \$50 (according to the situation of the stall); the collection of these sums being exacted upon the orders of members of the Market Committee, but not by resolution of the committee, and they were so exacted under the pretence that they were for the benefit of the city ;

That the accused received these sums as he received other revenues of the market.

It is proved and even admitted by the accused, that these last mentioned sums, received in the manner above stated, that is to say by the exchange of stalls, which had not become vacant by expiry of lease, but merely transferred by one tenant to another, were not by him remitted to the city with the other revenues, but were retained by him, and distributed, as he alleges, among certain members of the Market Committee.

Upon this proof, the judge declared the accused guilty of theft of the said sum of \$810, which he thus received on the exchange of stalls in sums of \$25 and \$50, and which he had neglected to pay over to the city ; and the learned judge concludes his case thus :

"The question submitted to this honourable court, is to ascertain whether the city of Montreal could recover the property of these sums thus paid, and if the accused, Tessier, in appropriating them and neglecting to pay them over to the city, has stolen them."

It is obvious, as submitted, that there are two questions : one as to the civil right of the city to collect these sums ; the other as to whether the accused, under the circumstances, has been guilty of theft.

In my opinion, it would not be necessary to decide the first question, if the case could be disposed of as one arising solely under Article 319 (c). But the charge, as laid, is not, cannot

be, under it. The charge, as laid, is simply that Germain Tessier stole \$810 belonging to the city of Montreal. If he did, he is, of course, guilty of "theft," and the conviction should stand.

Under such a charge it is immaterial whether he was the city's servant or not. If any one stole \$810 of the city's money, he would be equally guilty of "theft."

The confusion has arisen because it is supposed the charge was intended to be laid, and, strictly speaking, ought to be tried and disposed of as a charge under Article 319 (c).

As a charge under it, however, an indictment would be demurrable if it did not allege that the clerk of the municipality had received the money "by virtue of his employment," and had appropriated it.

If the charge was one under 319 (c), it would be immaterial whether the money was the property of the city or not. The gravamen of that charge is not that the money was the property of the city, but that it was "in his possession by virtue of his employment." Clause 319 (c) reads as follows: "Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who, being employed in the service of any municipality, steals anything in his possession by virtue of his employment." Not a word here about the ownership.

The full Article 319, with all its paragraphs, was simply enacted as a change of the law doing away with the distinction between "embezzlement" and "larceny."

The offence of "embezzlement" previous to the Criminal Code, was distinguished from the offence of larceny; but the sole distinction was that embezzlement was appropriating property belonging to the employer, before it passed into his possession, i.e., when it might be said to be in transitu in the hands of the servant.

This distinction was so clearly drawn by the authorities, that if a servant had been accused of embezzlement, and it was shewn that the money appropriated had been placed by the accused in the master's safe, and, after having been placed

there, had been withdrawn and appropriated by the servant, the offence was larceny, instead of embezzlement.

Under the change of the law, this distinction has been done away with. In other respects, the law remains the same as it formerly was, at least as to Government employees and employees of municipal corporations. When a charge is preferred against any of them under Article 319, it should be made under paragraph c, and state that the money appropriated was in the possession of the accused "by virtue of his employment," and if it did not so state, would be demurrable upon the ground that it did not allege all the particular circumstances which constitute the offence punishable by fourteen years' imprisonment, whether it be "embezzlement" or "theft."

This charge was not, therefore, laid under 319 (c), as it alleges only that he stole the money, the property of the city. Under an indictment charging stealing, by a municipal employee, of money in his possession "by virtue of his employment," the municipal employee would be guilty of "theft" if he appropriated the money, whether it was the property of the municipality or not. This is clearly shewn by Article 623, which enacts that in such an indictment the ownership may be laid in the municipality, *i.e.*, may be so laid, whether it is or not. The offence is complete and proof sufficient whether the property be owned by the municipality or not, if the employee has received possession of it "by virtue of his employment," and had appropriated it.

As to charges against Government employees and of employees of a municipality, the jurisprudence is settled that the possession obtained by the employee must be a possession "by virtue of his employment," in order to constitute his appropriation of it, the offence punishable by fourteen years, *i.e.*, the offence formerly embezzlement now made "theft." I am, therefore, of opinion that the conviction could not stand as a conviction of an offence charged against a municipal employee under 319 (c).

This, however, does not dispose of the case, inasmuch as it may be, and is, argued that the conviction is good as a conviction under Article 319 (a) or 305, as a simple charge of "theft." But as a simple charge of theft, the defendant is accused of stealing property belonging to the city of Montreal, and if he did so, as we have already said, it was immaterial whether he was a servant of theirs or not. As to such a charge he stands in the same position as any other person. But on such a charge, whether he could be convicted or not would depend upon whether he committed the act charged, "stealing property belonging to the city of Montreal." This brings up the first part of Judge Desnoyers' question. "Was the money the property of the city of Montreal, and could the city of Montreal recover the property of these sums?" The reserved case itself answers this question, because it sets up facts and circumstances which amount to proof that the city of Montreal had no legal title to the money, could not claim it, and that it was not their property. The reserved case states that the collection of these sums, which the accused appropriated, had never been authorized by resolution of the Market Committee. Unless it had been, and that resolution confirmed by the city council, manifestly the city could not recover these sums, had no legal right to them, and the money did not belong to the city. Therefore, the accused could not be convicted of stealing money belonging to the city of Montreal, when he did not.

It has been suggested that Article 305, in defining theft, does not limit the offence to the mere stealing of right of ownership, but extends to the stealing of any special right of property or interest in it. This is true, and from this it is argued that the city may have an interest in these sums, and right to recover them from Tessier—if for no other reason than to restore them. This proposition, however, admits that the city had no interest in them at the time they were taken; and if the city had no interest in them at the time they were taken, it seems clear that none could be stolen, *i.e.*, it would be impossible to steal what did not exist.

To constitute an offence of stealing, whether under Article 305, or 319 (a), or 319 (c), there must be in the property taken a right existing at the time of the taking, either to the ownership or to the possession of the property.

At the time Tessier received these monies the city had right neither to the money nor to the possession of it. Therefore, it could not be stolen from them, and he is not charged with stealing what of right belonged to any one else.

Perhaps the conviction should stand and the charge be maintained under Article 356. But that cannot be, as the Article 356 also applies to the offence of "theft," or any offence in respect to property, for which he is liable to the same punishment as if he had stolen it. It is simply enacted to cover all cases under Article 305, et seq., the punishment for which is not specially otherwise provided for; and this article fixes a punishment of seven years.

Under the circumstances set up in the reserved case, the offence committed by the accused in this case is not chargeable as "theft" under any of the articles from 303 to 357 inclusive.

It is beyond our present enquiry to decide as to what the offence was, but we may point out that if the offence was obtaining money under false pretences, the punishment is not seven years, but three, under Article 359.

I am of opinion, therefore, that the facts proved, as stated in the reserved case, do not warrant a conviction on a charge of theft, and that the conviction in this case ought to be quashed.

The judgment of the court (Bossé and HALL, JJ., dissenting) was entered as follows:—

"It is considered and adjudged and finally determined by this court that an entry be made in the record to the following effect:

"1. The boni, or monies, paid to and received by the defendant, were not the property of the city of Montreal, and the defendant did not steal monies, or boni, belonging to the said city;

"2. The offence of theft, with which defendant is charged, is unfounded, and his conviction thereof by the said judge of the sessions is illegal, wrong and void ;

"And, therefore, it is ordered and adjudged that the conviction of defendant on said charge by M. C. Desnoyers, Esq., judge of the Sessions of the Peace, at Montreal, on the 7th of July, 1900, be quashed and set aside, and that an entry on the record be made accordingly.—Dissenting the Honourable Justices Bossé and Hall."

Conviction quashed.

J. P. Cooke, Q.C., for the Crown.

F. J. Bisailon, Q.C., and R. Lemieux, Q.C., for the defendant.

Note: Fraudulent conversion by clerks, servants or agents—Distinction between "servant" and "agent"—Cr. Code secs. 308, 319.

Section 319 of the Criminal Code deals with the offence of theft by a clerk or servant while sec. 308 includes cases of misappropriation in which the accused though he may not have been either a clerk or a servant of the person to whom he was to account, and though not bound to deliver over the identical money or valuable security received by him, fraudulently converts the same to his own use or fraudulently omits to account for the same or the proceeds, having received the same "on terms requiring him to account for or pay the same or the proceeds thereof, or any part of such proceeds to any other person." The "terms" referred to are the terms on which the defendant when he receives it, holds it, and not necessarily terms imposed by the person from whom the money, etc., is received, *R. v. Unger* (1894), 30 C.L.J. 428.

The test as to whether a person is a "clerk or servant" to whom sec. 308 would apply is: was he under the control of and bound to obey his alleged master? *R. v. Negus* (1873), L.R. 2 C.C.R. 34, 12 Cox 492. To constitute the offence formerly designated "embezzlement" there must have been an employment as clerk or servant, the receipt of the money by him must have been for and on behalf of the master, and the fraudulent appropriation by him must have taken place before the money got into the master's possession, *Ferris v. Irwin*, 10 U.C.C.P. 117.

Where the accused was employed by the prosecutor to solicit orders and collect monies, for which he was paid by commission, being at liberty to get orders when and where he pleased, but to be exclusively in the employ of the prosecutor and to give his whole time to the prosecutor's service, it was held that he was the "servant" of the prosecutor, *R. v. Bailey* (1871), 12 Cox 56. And where a director of a joint stock company was employed at a salary to superintend its business and collect monies due to the company,

He is a servant of the company, *R. v. Stuart*, [1894] 1 Q.B. 310. But a person employed by the prosecutors as their agent for the sale of coal on commission and to collect money in connection with his orders, but who was at liberty to dispose of his time as he thought best and to get or abstain from getting orders as he might choose was held not to be a "clerk" or "servant," *R. v. Bowers* (1866), L.R. 1 C.C.R. 41, 10 Cox C.C. 250.

And where the accused was a collector and accountant carrying on an independent business, and was employed by the prosecutors to collect certain accounts for them on commission, and he was to pay over the net proceeds as the collections were made, but time and mode of collecting were left to the discretion of the collector, it was held that he was not a "clerk" or "servant" of the prosecutors. *R. v. Hall* (1875), 13 Cox C.C. 49.

In *Regina v. Topple*, 3 Russell & Chesley (Nova Scotia), 566, the accused, not having been in the employ of the prosecutor, was sent by him to one M. with a horse, as to which M. and the prosecutor, who owned the horse, had had some negotiations, with an order to M. to give the bearer a cheque if the horse suited. Owing to a difference in the price the horse was not taken, and the accused brought it back. Shortly afterwards the accused, without any authority from the prosecutor, took the horse to M. and sold it as his own property or professing to have the right to dispose of it, and received the money. It was held the money was not received by the accused as clerk or servant of the prosecutor, and a conviction for embezzlement was set aside. *Regina v. Topple*, 3 Russell & Ches. 566.

The offence of fraudulent conversion of the proceeds of a valuable security, mentioned in Code sec. 308, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. *R. v. Hogle* (1896), 5 Can. Cr. Cas. 53 (Que.).

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., BARKER, MCLEOD AND VAN WART, JJ.

Ex parte FLANAGAN.

Constitutional law—Dominion legislation extending jurisdiction of Provincial Court—Parish Court Commissioners in New Brunswick—Canada Temperance Act, R.S.C. ch. 106, sec. 103—Third offence—Autrefois acquit—Identity of charge—Onus—C.S.N.B. ch. 59, sec. 2.

1. The dismissal of a prior charge under the Canada Temperance Act in which the offence was laid as between certain dates is not necessarily a bar to a subsequent prosecution for an offence committed within the same period of time, but the question of identity of offence is for the magistrate.
2. Upon a defence that the accused had been formerly acquitted in summary proceedings before magistrates for the same alleged offence, the onus of proving the identity of the charge is upon the defendant.
3. The Parliament of Canada has not the power to give to a Provincial Court a jurisdiction which is not within the scope of such Court's powers as established by the Provincial Legislature.
4. Sec. 103 of the Canada Temperance Act, R.S.C. 1886, ch. 106 (amended by 51 Vict. ch. 34, sec. 6) is *ultra vires* of the Dominion Parliament in so far as it purports to confer jurisdiction upon Parish Court Commissioners in New Brunswick to entertain prosecutions thereunder.
5. A summary conviction by a magistrate for a third offence under the Canada Temperance Act was quashed on the ground that one of the prior convictions relied upon was made by a Parish Court Commissioner, the jurisdiction of which Court under provincial law did not extend to such prosecutions.

ARGUED: November 3, 1898.

DECIDED: February 10, 1899.

The defendant was convicted before John Nevin, police magistrate of Newcastle Miramichi, on the 24th of June, 1898, for selling intoxicating liquor, contrary to the provisions of the Canada Temperance Act.

He was convicted of a third offence, and sentenced to two months' gaol.

An order *nisi* for a certiorari returnable at Michaelmas was granted during the Trinity vacation. When cause was shewn against the order the grounds upon which it was granted were stated as, 1st, the alleged offence is shewn to have taken place within the period named in a former information which was

dismissed, as appears by certificate, and this conviction is shewn to have been for the same offence. 2nd. Prosecution was not commenced within three months after the alleged offences. (a) Issuing of summons is the commencement of prosecution; (b) if the laying of information is the commencement of prosecution within the meaning of the section, the long delay in issuing shews that the making of information (22nd of April), was not a *bonâ fide* commencement. 3rd. Selling was not by consent but contrary to order of defendant. 4th. That the conviction made by George F. Fraser, Parish Court Commissioner, upon which the present conviction for a third offence was founded, and relied upon to secure this one, was bad in law, as the Parish Court Commissioner had no jurisdiction to try the case.

FREDERICTON, N.B., November 3, 1898.

R. A. Lawlor, for the motion.

L. A. Currie, Q.C., contra.

FREDERICTON, N.B., February 10, 1899.

The judgment of the Court was delivered by

TUCK, C.J.:—

My memory is that the first three points were disposed of at the argument. The important point is the fourth.

As to the first point, it was a question for the magistrate to decide. In *R. v. Marsh*, *In re Tennant*, 25 N.B.R. 371, it was held that the onus was on the defendant to prove that the two charges were identical; that the keeping for sale, with which he was charged, was, in fact, the selling for which he was convicted; and that the mere fact that the days between which he was charged with keeping liquor for sale were included in the times stated in the conviction for selling, did not sustain a defence of *autrefois* convict. See also *Ex parte Hopper*, 27 N.B.R. 496, and *Ex parte Perkins*, 30 N.B.R. 15. There are

also *Ex parte Whalen*, 32 N.B.R. 274, and *Ex parte McManus*, 32 N.B.R. 481.

As to the second point, this Court has decided in, I think, *Ex parte Lloyd* [Michaelmas, 1896, unreported] that the laying of the information is the commencement of the prosecution. This Court has more than once held that who was responsible for the selling was a question for the magistrate.

Then we come to the fourth point upon which there has never been a direct decision in this Province. The jurisdiction of Parish Court Commissioners is given by sec. 2, ch. 59 Con. Stat. N.B. It is there enacted that "Every such commissioner shall have jurisdiction in the county in which he resides, and for which he may have been appointed a justice of the peace, over the following civil actions: first, actions of debt, including any claim for a sum certain or a specialty, when the sum demanded does not exceed forty dollars; second, actions of tort to real or personal property, when the damages claimed do not exceed sixteen dollars; but no commissioner shall have jurisdiction over civic actions where the Queen is a party, or where the title of land shall come in question, etc.

By sec. 92, sub-sec. 14, of the British North America Act the administration of justice in this Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts as to the laws governing those matters, is exclusively within the power of the Provincial Legislature.

Prosecutions for violation of the second part of the Canada Temperance Act, ch. 106, sec. 103 (d) Revised Statutes of Canada, may be brought "in the Province of New Brunswick before any police stipendiary or sitting magistrate, or commissioner of a parish Court, or before any two justices of the peace in and for the county in which the offence was committed."

The contention is that the Parliament of Canada has not the power to give jurisdiction to a Provincial Court, which it does not have by the laws of the Province.

This Court has always, and that recently in *The Queen v. Wright* which came before the York county court for trial, held that the Canadian Parliament has not the power to take away from the county courts the powers to try criminal cases given to them by Provincial legislation. In so deciding this Court followed the judgment of the Supreme Court of Canada in *Re County Courts of British Columbia*, 21 Can. S.C.R. 446. In delivering judgment in that case the present Chief Justice Strong says: "The powers of the federal government respecting Provincial Courts are limited to the appointment and payment of the Judges of those Courts, and to the regulation of their procedure in criminal matters. The jurisdiction of parliament to legislate as regards the jurisdiction of criminal Courts is, I consider, excluded by sub-sec. 14 of sec. 92, before referred to, inasmuch as the constitution, maintenance, and organization of Provincial Courts plainly includes the power to define the jurisdiction of such Courts, territorially as well as in other respects. This seems to me too plain to require demonstration. Then, if the jurisdiction of the Courts is to be defended by the Provincial legislations, that must necessarily also involve the jurisdiction of the judges who constitute such Courts."

Following this reason and conclusion, by which of course we are bound, it seems to me clear that the Parliament of Canada cannot give jurisdiction to Parish Court Commissioners, which otherwise they would not have.

I am, therefore, obliged to say that the rule must be made absolute for a certiorari.

Rule absolute.

Note: *Legislative power to confer jurisdiction in criminal matters.*

In Ontario a provincial statute, 53 Vict., ch. 18, was passed, by which it was declared that Courts of General Sessions should have jurisdiction to try any person for any offence under certain sections of the Forgery Act, R.S.C. ch. 165. It was held that the provincial legislature had power to so enact, and that such a provision was one relating to the constitution of a court rather than to criminal procedure. *R. v. Levinger*, 22 Ont. R. 690. But a provision in the same statute authorizing police magistrates to try and to convict persons charged with forgery was declared *ultra vires*. *R. v. Toland*, 22 Ont. R. 505.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE MARTIN, J.

Re SING KEE.

Summary proceeding—View of locus in quo by magistrate—Adjudication partly founded on view of locus—Certiorari taken away by statute—Defect in procedure depriving accused of fair trial—Amendment of conviction removed on certiorari—Indian Act, R.S.C. ch. 43, sec. 108—Crim. Code sec. 889.

1. In a summary proceeding for an illegal sale of liquor under the Indian Act, a conviction will be quashed if, after the close of the evidence, the magistrate went alone and took a view of the place of sale, and so stated when giving his judgment, and this notwithstanding that the defendant was present when the view was had.
2. A statute which declares that convictions thereunder shall not be removed by certiorari into any superior court is not a bar to the issue of a certiorari upon the ground of improper conduct of the magistrate, by which the accused was deprived of a fair trial.
3. The powers of amendment conferred by Code sec. 889 in respect of convictions removed by certiorari do not apply where there is an inherent defect in procedure which has deprived the accused of a fair trial, ex. gr., a view of the locus in quo taken by the magistrate in the absence of the parties.

ARGUED: February 22, 1901.

DECIDED: February 22, 1901.

Summons to make absolute a rule nisi for certiorari.

On 14th November, 1900, the applicant, Sing Kee, was tried before G. E. Corbould, Police Magistrate for the city of New Westminster, on a charge of selling an intoxicant to an Indian. At the conclusion of the evidence the magistrate reserved his decision until the 20th of November, and immediately afterwards informed the applicant that there was a second charge against him for selling intoxicants to an Indian on a subsequent date, the hearing of which was adjourned till the 20th of November.

On the 19th of November the Magistrate, in passing the premises of the applicant, took occasion to go in and view the place where the liquor was alleged to have been sold. On the 20th of November he heard the evidence in the second case, and at its conclusion sentenced the applicant on both charges, and in

the course of his remarks stated that he had seen the premises during adjournment, and he fined the applicant \$75 for the first offence and \$100 for the second, and in default imprisonment for six months.

On 11th December, *Howay*, for Sing Kee, applied for and obtained an order nisi on the ground *inter alia* that the magistrate had no power to view the place where the offence was alleged to have been committed, and in so doing, acted without authority, and that the conviction was therefore bad.

NEW WESTMINSTER, B.C., February 22, 1901.

Howay, in support of the rule, contended that all the evidence in the first case having been heard, and counsel closing the case, and it being taken into consideration by the magistrate, he had no jurisdiction to take this view, which was really the taking of further evidence behind the back of the prisoner and his counsel. A view is only substitution of evidence by the eye for evidence by the ear: *Regina v. Petrie* (1890), 20 Ont. R. 317.

Dockrill, in support of the conviction: *Regina v. Petrie* is distinguishable on the ground that in this case the defendant was present at the view along with the magistrate, and he read the latter's affidavit to that effect. He further relied upon sec. 889 of the Criminal Code, and contended that up to the time of the adjournment there was ample evidence to sustain a conviction; that the Court might disregard under this section "the view" taken by the magistrate, and that therefore the magistrate having jurisdiction up to the time of the adjournment no certiorari would lie, citing on this point *The Colonial Bank of Australasia v. Willan* (1874), L.R. 5 P.C. 417, and sec. 108 of the Indian Act, R.S.C. ch. 43.

Upon the question of the amendment of the conviction under sec. 889 of the Code, he referred to *The Queen v. Murdock* (1900), 4 Can. Cr. Cas. 82; 27 A.R. 443. The right of certiorari is taken away by the Indian Act and the time for

appeal extended. The magistrate had jurisdiction to begin the inquiry, and no fraud is alleged, so that the only remedy here is by appeal: see *Regina v. Cunerty* (1894), 26 Ont. R. 53; 2 Can. Cr. Cas. 325; *Regina v. Coulson* (1893), 24 Ont. R. 246; 1 Can. Cr. Cas. 114; and *Regina v. Coulson* (1896), 27 Ont. R. 60.

Howay, in reply: The Canada Temperance Act, ch. 106, sec. 19, also took away the writ of certiorari in practically the same words as the Indian Act, yet it was held the writ lay in *Regina v. Eli* (1886), 10 Ont. R. 727, and *Regina v. Wallace* (1883), 4 Ont. R. 140. So also the writ of certiorari was taken away in the Ontario Public Health Act, but nevertheless certiorari lies for want of jurisdiction: see *Re Holland* (1875), 37 U.C.Q.B. 214. In *Ex parte Hill* (1891), 31 N.B.R. 84, certiorari was held to lie even though taken away by sec. 108 of the Indian Act. These cases shew that where a magistrate has been guilty of a clear dereliction of duty or improper conduct, or has acted contrary to natural justice, the writ will lie though taken away by statute. As to sec. 889, he contended it did not apply to the irregular action of the magistrate, but to the irregularity of the conviction, and here the conviction is perfectly regular.

NEW WESTMINSTER, February 22, 1901.

MARTIN, J.:—Even though sec. 108 [of the Indian Act, R.S.C. ch. 43] purports to take away the right to certiorari, I think the cases shew that it nevertheless lies where there has been improper conduct of the magistrate or the fundamental principle entitling the party to a fair trial has been overlooked.

I hold that what is complained of here is not within the scope of sec. 889 of the Criminal Code—it is really an inherent defect in the course of legal procedure, something not warranted by law—which voids the conviction even though the course

taken by the magistrate was with the best intention: *Regina v. Petrie* (1890), 20 Ont. R. 317.

The conviction will be quashed, but without costs.

Conviction quashed.

[COURT OF QUEEN'S BENCH, QUEBEC.]

DISTRICT OF MONTREAL.

BEFORE BABY, BOSSÉ, BLANCHET, HALL AND WÜRTELE, JJ.

THE QUEEN v. TAYLOR.

Indictment—Describing the offence—Attempted theft from a person unknown—Property of unknown person—Vagueness of description—Proof of principal offence on a charge of attempt—Validity of conviction for attempt—Crim. Code secs. 64, 528, 529, 712.

1. An indictment, charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person, without giving the name of the person against whom the offence was committed, or the description of the property the accused attempted to steal, is sufficient.
2. Where a prisoner is indicted for an attempt to steal, and the proof establishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the Court discharges the jury and directs that the prisoner be indicted for the complete offence (Code sec. 712).

DECIDED: June 20, 1895.

CASE reserved on March 20th, 1895, by the Hon. Mr. Justice Baby, presiding at the March Term of the Court of Queen's Bench (Crown Side), as follows:—

“On the 11th March instant, one John Taylor underwent his trial, before this Court, on the following indictment:—

“The jurors of Our Lady the Queen present that:—

“George Johnson and John Taylor, on the 8th December, 1894, at the city of Montreal, in the district of Montreal, did unlawfully attempt to steal from the person of an unknown

person, the property of the said unknown person.' (Arts. 528, 529, Criminal Code.)

"The above named George Johnson broke jail, and is now a fugitive from justice.

"When Taylor was arraigned, his counsel moved that the indictment be quashed 'on account of the vagueness of the indictment, which, in fact, stated or disclosed no crime or offence for which he might be brought up for trial.'

"I overruled his motion, stating at the same time that I would very probably reserve the point, further on, for the consideration of a higher court.

"At the trial it appeared by the evidence produced that three persons, among whom was Taylor, had, during the night, waylaid on the public street an old man, then appearing to be somewhat under the influence of liquor, one forcibly holding him, the second going through his pockets, whilst the third man held a pistol to his head. One witness testified that he had seen one of the above accused taking out of the coat pockets of the old man in question a parcel wrapped up in paper, and putting the same in one of his own pockets.

"In his address, Taylor's counsel admitted the facts and the presence of Taylor there, but raised anew his objection on account of the vagueness of the indictment, and also the absence of any proof of a crime punishable by law.

"I charged the jury on the law of the case (Art. 64, par. 2 of the Criminal Code), stating to them at the same time that if they should bring in a verdict of guilty against Taylor, I would reserve the points raised by his counsel for the adjudication thereon by the full Court of Queen's Bench.

"I now, therefore, submit the above two points for the adjudication thereon of the said Honourable Court."

MONTREAL, June 20, 1895.

WÜRTELE, J.:—John Taylor was indicted, with one George Johnson, for having, on the 8th day of December, 1894, at the

city of Montreal, unlawfully attempted to steal from the person of an unknown person, the property of such unknown person.

George Johnson broke jail and became a fugitive from justice, and John Taylor was therefore arraigned alone. His counsel moved that the indictment should be quashed on account "of the vagueness of the indictment, which in fact stated or disclosed no crime or offence for which he might be brought to trial." But his Honour Mr. Justice Baby overruled the motion.

At the trial it appeared that three persons, including John Taylor, had during the night waylaid an old man, who was somewhat under the influence of liquor; that one of his assailants forcibly held him; that the second went through his pockets, and that the third held a pistol to his head. One of the witnesses testified that he had seen one of the two persons indicted take a parcel wrapped up in paper from one of the coat pockets of the old man and put it in his own pocket. In his address to the jury, John Taylor's counsel admitted the facts and also the presence of Taylor at the occurrence, but he again urged the objections contained in his motion. The jury found John Taylor guilty, but his Honour Mr. Justice Baby reserved and submitted for the adjudication of this Court the two points raised by the prisoner's counsel: First, that the indictment was illegal on account of the vagueness of its allegations; and, secondly, that it did not disclose any crime punishable by law.

With respect to the first point, as to the vagueness of the indictment, it is urged in the first place that the person on whom the attempt to steal was made is not mentioned, and then that the property attempted to be stolen is not described.

Every indictment must be framed with certainty, so as to clearly identify the accusation; and, as a general rule, the name of the person against whom an offence has been committed should be given, and any property which has been the subject of an offence should be described. But in certain cases a crime might go unpunished if it should be impossible to give the name of the party against whom the crime has been committed,

and, in such cases, it is sufficient, as an exception to the general rule, for the grand jury to state that it has been committed against a person to the jurors unknown. Roscoe, in his work on Criminal Evidence, p. 82 of the 11th edition, says: "An indictment is good stating that the prisoner stole or received the goods of a person to the jurors unknown," and we see in the American and English Encyclopædia, *Vo. Indictment*, p. 599, that it has also been held in the United States that "an indictment which alleges that the owner is a person whose name is unknown to the grand jurors is valid." And Bishop, in his work on Criminal Law, vol. 2, No. 788, says: "Things, to be the subject of larceny, must have an owner in fact; though doubtless he may be unknown to the thief, as he certainly may be to the grand jury who indict him."

In the case of a theft which has been consummated, the property stolen should be described in at least a general way; but a criminal would often escape punishment if this rule were extended to the case of an attempt to steal. Where a man attempts to pick a pocket he commits a crime, even if there should be nothing in the person's pocket. The attempt is one to steal whatever might be in the person's pocket, and, although a theft could not be accomplished, the mere attempt to steal constitutes an offence in law. When a person is indicted, therefore, for an attempt to steal, it is not necessary to specify any goods. It is sufficient to say, as in the present case, that the prisoner attempted to steal the property of such a person or of an unknown person. Archbold, in his work on Criminal Pleading and Evidence, p. 396 of the 20th edition, says: "In an indictment for an attempt to steal, it is sufficient to aver that the prisoner attempted to steal the goods of A. B. without specifying the particular goods."

In the present case the indictment is consequently valid, as it was sufficient to allege that the prisoner attempted to steal from the person of an unknown person property belonging to such unknown person.

With respect to the second point—that the indictment did not disclose any crime punishable by law—both by common law and under Art. 64 of the Criminal Code, every attempt to commit a crime is an indictable offence, and the indictment sets out clearly an attempt to steal.

The indictment, therefore, discloses an offence in law, and is sufficiently explicit.

It is true that the prisoner is indicted for an attempt to steal, and that the proof establishes the commission of the full offence; but under Art. 712 of the Criminal Code, in such a case, the jury may convict of the attempt, unless the Court discharges the jury and directs that the prisoner be indicted for the complete offence.

The ruling appealed from is therefore confirmed, and the verdict is sustained.

JUDGMENT:—

“After having heard counsel as well for the prisoner as for the Crown, and due deliberation had on the case transmitted to this Court from the Court of Queen’s Bench sitting at Montreal on the Crown Side; it is considered and adjudged and finally determined by the Court now here, pursuant to the statute in that behalf, that an entry be made in the record to the effect that in the opinion of this Court the proceedings had or taken in the said Court at Montreal are regular, that the ruling of the Judge presiding at the said Court of Queen’s Bench is correct, and that no reason hath been assigned, by and on behalf of the prisoner, sufficient to set aside the conviction in this case.

“It is therefore ordered that the said conviction be, and the same is hereby affirmed, and that it do stand in full force and effect, and that judgment be given thereon by the said Court of Queen’s Bench sitting at Montreal.”

Conviction affirmed.

J. L. Archambault, Q.C., for the Crown.

Sheridan, for the prisoner.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., HANINGTON, LANDRY, BARKER AND
VAN WART, JJ.

Ex parte DOHERTY.

Summary conviction—Adjudication of imprisonment—Defendant not detained in custody—Subsequent warrant of commitment—Delay of execution at defendant's request—Money deposit with constable—Arrest concurrent with return of deposit—Crim. Code secs. 859, 863.

1. Where a warrant of commitment under a summary conviction which adjudges imprisonment is delivered to a constable, and the defendant then being at large deposits money with the constable as security for his appearance when required and procures the constable to delay the execution of the commitment for a time, the defendant cannot object to a subsequent arrest, accompanied by a return of his deposit, on the ground that it was illegal as being a second arrest under the same warrant.
2. *Semle*, an unreasonable delay in issuing a warrant of commitment may be a ground for discharge on habeas corpus if the delay works an injustice to the defendant.

ARGUED: November 14, 1899.

DECIDED: November 17, 1899.

The applicant, an hotel keeper, in the month of January, 1899, was convicted of a fourth offence against the Canada Temperance Act, and was sentenced to two months' imprisonment in the county gaol at Hampton. The warrant for his arrest was held over from January till the first of September, at which time the constable sought to execute it. The applicant, being especially anxious to avoid imprisonment at that particular time, requested the constable to allow him to go at large for a time, which the constable did, having first taken from him a deposit of one hundred dollars as security for his appearance when wanted. On the 18th of September the constable, on the same warrant, arrested the applicant and took him to the county gaol to serve his sentence. The money deposited was returned to him.

Upon these facts an application for an order in the nature of a habeas corpus was made to Mr. Justice McLeod in

Chambers, and the matter was by him referred to the Full Court.

FREDERICTON, N.B., November 14, 1899.

Pugsley, Q.C., in support of the application. There are two grounds upon which the prisoner claims to be discharged. 1st. As the constable voluntarily discharged the prisoner from arrest under the warrant, the second arrest under the same warrant was illegal. 2nd. This Court, under its general supervising power, ought to discharge the prisoner by reason of the issuing of the warrant being delayed from January until September. Upon the first point he cited *Reg. v. Hawke*, 28 N.B.R. 400; *Doyle v. Russell*, 30 Barb. (N.Y.) 300; which overrules *Clarke v. Cleveland*, 6 Hill, (N.Y.) 344; 2 Hawk. P.C. 129, ch. 13, sec. 9; 5 Burn's Justices 1137; 1 Russ. on Crimes (5th ed.), 571; 6 Am. & Eng. Enc. 853 d. Several affidavits were read in support of the second point.

McCully contra, on the first point cited the following authorities: *Butt v. Jones*, Gow. 99; *Cantellow v. Trueman*, 2 Dowl. P. C. 2; *Reg. v. Renton*, 5 D. & L. 750; *Lewis v. Morland*, 2 B. & A. 56; *Puckford v. Maxwell*, 6 T.R. 52; 1 Russ. on Crimes (6th ed.), 894; 2 Hawk. P. C. 192, 193, secs. 10 and 12. He also read some affidavits in answer to those read on behalf of the applicant.

Pugsley, Q.C., in reply.

FREDERICTON, N.B., November 17, 1899.

TUCK, C.J.:—I do not think that the prisoner is entitled to be discharged. Whatever was done by the constable was done at the instance of Doherty, upon his request and for his benefit and accommodation, and he cannot be heard now to say that it was illegal. As to the delay in issuing the warrant, while if an injustice were being done this Court could, and no doubt

would, interfere, there has been nothing shewn here to make such interference necessary. I am of opinion, therefore, that the matter should be sent back to Mr. Justice McLeod with instructions to refuse the order in the nature of a habeas corpus.

VANWART, J. (dissenting):—I am of the opinion that, as the letting of the prisoner go after the first arrest amounted to what is technically a voluntary escape, the second arrest was, under the authorities cited by Mr. Pugsley, illegal, and that the prisoner should, therefore, be discharged.

HANINGTON, LANDRY, BARKER and MCLEOD, JJ., agreed with the learned Chief Justice.

Application refused.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, J.

THE KING v. MacDONALD.

Canada Temperance Act—Jurisdiction of magistrate—Information before one magistrate and trial before another—Invalidity—Third offence—Proving previous conviction—Habeas corpus—C. T. Act, R.S.C. 1888, ch. 106, secs. 104, 115 (b)—51 Vict., (Can.) ch. 34, sec. 7.

1. Sec. 104 of the Canada Temperance Act, as amended 1888, ch. 34, has the effect of giving to a police or stipendiary magistrate before whom an information was laid the exclusive jurisdiction to try the case, and a conviction made by another stipendiary magistrate on the same information is void.
2. Where such an information and conviction thereon are produced in a subsequent prosecution as proof of a previous conviction (C. T. Act, sec. 115 (b)), the record of conviction is of no more force than if signed by one who had ceased to be a magistrate before the date thereof, and is not evidence.
3. A defendant imprisoned on a conviction for a third offence under the Canada Temperance Act is entitled to be discharged on habeas corpus if the conviction relied upon as proving a previous conviction for a second offence was made by a police or stipendiary magistrate irregularly proceeding under and by virtue of an information in respect of such second offence laid before another police or stipendiary magistrate or magistrate vested with the authority of two justices.

ARGUED : November 26, 1901.

DECIDED : November 26, 1901.

Motion on notice to the prosecutor, convicting justice, and the jailer on the return of a writ of habeas corpus issued by Weatherbe, J., under ch. 181 of the Revised Statutes, 1900, "Of securing the liberty of the subject" on the application of William MacDonald, a prisoner in the county jail at Pictou. The proceedings before the justice were brought before the Court under an order in the nature of a certiorari made under sec. 7 of said statute by Townshend, J.

All the facts in connection with the case are set out in the judgment of Weatherbe, J.

John J. Power, for the prisoner, cited R.S.C. ch. 106, secs. 100, 107, Acts (Dom.) 1888, ch. 34, sec. 7; *R. v. Ettinger*, 32 N.S.R. 176; *Ex parte Edgar*, 31 N.S.R. 129; *R. v. Clarke*, 15

O.R. 49 ; *R. v. Brown*, 16 O.R. 41 ; Paley on Convictions, 7th ed., pp. 346-7.

No one contra.

HALIFAX, November 26, 1901.

WEATHERBE, J.:—This a motion in the nature of a writ of habeas corpus under the provision of our statute to discharge the applicant William MacDonald, a prisoner in the county jail at Pictou.

The return shows that MacDonald is confined under a warrant of commitment in execution dated October 29th, 1901, and made by George H. MacKay, stipendiary magistrate in and for the county of Pictou, wherein it is alleged that MacDonald having on that day being convicted before him of a *third* offence against the second part of the Canada Temperance Act, namely: of having unlawfully kept for sale intoxicating liquors at his premises in the town of Westville, in the county of Pictou, between the 1st of July, 1901, and the 30th of August, 1901, is therefore adjudged to be imprisoned in the county jail at Pictou for the term of fifty-six days, which punishment and sentence he is now undergoing.

The warrant also recites a conviction for a *second* offence after information laid for a first offence of MacDonald before the same magistrate on the 18th of May, 1901, for having unlawfully kept intoxicating liquor for sale at his premises in the town of Westville aforesaid, between 12th February, 1901, and 11th of May, 1901, for which a penalty of \$100 was imposed.

The same warrant likewise sets out a first conviction of MacDonald had for a *first* offence against the Canada Temperance Act before R. M. Langille, police magistrate for the town of Westville for having unlawfully sold intoxicating liquor between the 20th April, 1900, and the 20th June, 1900, for which a penalty of \$50 was imposed.

The conviction first above mentioned and known as a conviction for a *third* offence must rest upon and be supported by

the second and first convictions recited in the warrant by virtue of the provisions of sec. 115 of the Canada Temperance Act.

It is provided by sub-section (b) of that section that "The number of such previous convictions shall be provable by the production of a certificate under the hand of the convicting justice or magistrate or officer, or the clerk of the peace, without proof of his signature or official character, or by other satisfactory evidence."

The convicting justice in pursuance of that provision had on MacDonald's trial the first and second convictions proved before him by the production of the original convictions and the original informations on which they are founded, and all these were duly made a part of the prosecutor's case, and these convictions and informations are returned by the convicting justice in obedience to an order issued under the statute.

It appears that the information for the second offence set out in the warrant was laid on the 18th of May, 1901, before Alexander McHardy, stipendiary magistrate in and for the county of Pictou, and the conviction itself which followed was had before George H. MacKay, stipendiary magistrate in and for the county of Pictou, the convicting justice in this case.

It is provided by sec. 104 of the Canada Temperance Act as amended by ch. 34 of the Acts of Canada for 1888 that in prosecutions brought to recover penalties for violations such as these of the second part of the Canada Temperance Act: "If any prosecution is brought before any such stipendiary magistrate . . . no other justice shall sit or take part therein."

It is decided in *The Queen v. Ettinger*, 32 N.S.R. 176; 3 Can. Cr. Cas. 387, that the laying of an information such as this is the bringing of a prosecution.

In the case of this second conviction against MacDonald then it appears that the prosecution was brought before one stipendiary magistrate and that another justice sat and made the conviction in direct controvention of the statute last quoted and that it is, therefore, void as having been made by an officer

who is expressly prohibited by the statute from giving any such judgment. That conviction would appear to stand on the same basis as if it had been forged or made by one who ceased to be a justice before he made the order.

If this second conviction is of this character it follows that the conviction of MacDonald for a third offence is bad and unwarranted by law.

Ex parte Edgar, 31 N.B.R. 129, and *R. v. Clarke*, 15 O.R. 49, cited to me by Mr. Power, are authority for this principle—if authority is wanted—on which MacDonald is entitled to his discharge from jail; and an order will be made to that effect, protecting the sheriff and jailer who acted in good faith from all civil liability.

Prisoner discharged.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL

BEFORE OUIMET, J.

THE KING v. PORTUGAIS.

Summary trial by Recorder's Court, Montreal—No right of appeal—Crim. Code secs. 782, 783, 879.

1. No appeal lies from the decision of the Recorder's Court of Montreal holding a "Summary trial" under Cr. Code, sec. 783.

MONTREAL, December 10, 1901.

OUIMET, J.:—The appellant was brought before the Recorder's Court of the city of Montreal on a charge of having kept a house of ill-fame under sec. 198 Cr. Code. He was given a summary trial under secs. 782, 783, and 784 Cr. Code, found guilty, and sentenced accordingly.

It is now sought to have this conviction revised and set aside through an appeal to this Court under sec. 879 Cr. Code. The appeal to this Court provided by this section is from a conviction by "a justice of the peace" as defined in sec. 839 Cr. Code in Part LVIII., under the title of "Summary convictions."

The conviction appealed from in this case was for an indictable offence tried under the Summary Trials Act by a court whose jurisdiction is the same as that of a "magistrate" as defined in sec. 782 (i):—

"782. In this part, unless the context otherwise requires: (a) the expression 'magistrate' means and includes: (i) in the provinces of Ontario, Quebec and Manitoba, any recorder, judge of a county court, being a justice of the peace, commissioner of police, judge of the sessions of the peace, police magistrate, district magistrate, or *other functionary or tribunal*, invested by the proper legislative authority, with power to do alone such acts as are usually required to be done by two or more justices of the peace, and acting within the local limits of his or of its jurisdiction."

Now, referring to Article 2489 R.S.P.Q., it will be seen that: "All powers and jurisdiction conferred upon the Judges of the Sessions of the Peace for the cities of Quebec and Montreal, or upon two or more justices of the peace, by the provisions of the following section, were vested in and may be exercised by the Recorders and by the Recorder's Courts of and for the said cities, and by those who by law act in the absence on account of sickness or otherwise of the said Recorders, or when there is no Recorder, and discharge the duties of that office: C.S.L.C. ch. 102, sec. 20."

The effect of this provision of the law is to bring the Recorder's Court under and within the meaning of the above sec. 782 (i), and to give to its decisions the same character as those of a "magistrate."

Now, under sec. 798 Cr. Code, "every conviction under this part (Summary Trials) shall have the same effect as a conviction"

tion upon indictment for the same offence," and of such conviction no appeal lies to this Court but to the Court of Appeals as provided in Part LII. Cr. Code.

The appellant's counsel has called my attention to an amendment of the Cr. Code, 58 & 59 Vict., ch. 40, by which it is provided as follows:—

"Sec. 782 (v). In all the provinces where the defendant is charged with any of the offences mentioned in (a) and (f) of sec. 783, any two justices of the peace sitting together; provided that when any offence is tried by virtue of this subparagraph, an appeal shall lie from a conviction in the same manner as from summary convictions under Part LVIII., and that sec. 879 and the following sections relating to appeals from such summary convictions shall apply to such appeal."

The effect of this new paragraph in sec. 782 is to give two justices of the peace the same jurisdiction for the summary trial of such offences as the one of which appellant has been convicted. Such convictions by two justices of the peace could then be appealed from to this Court under sec. 879, but it in no way affects convictions by "a magistrate," which, under the above sec. 879, are not susceptible of appeal to this Court.

The motion to dismiss the present appeal is allowed, and the appeal is dismissed with costs.

Appeal dismissed.

NOTE.—This decision is in accord with the decision of Würtele, J., *In re The Queen v. Racine*, 3 Can. Cr. Cas., p. 446, and of Mathieu, J., *In re The Queen and Bougie*, 3 Can. Cr. Cas., p. 487.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

STODDARD v. PRENTICE.

Contempt of Court—Observations in newspaper pending suit—Application to commit—Crim. Code secs. 290, 292, 293.

1. The Court has power summarily to commit for constructive contempt notwithstanding Code secs. 290, 292, and 293 as to fair reports of court proceedings and fair comment upon public affairs; but the Court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice.
2. A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case, is a contempt of Court.
3. A statement to the effect that a Judge of the Court having taken an active part in a general election, would have to devote his spare moments to schooling himself into forgetfulness of his political career, is not a contempt.
4. A statement to the effect that the spectacle of such Judge trying election cases is not edifying and that it does not produce a good impression in the public mind, is not a contempt.
5. A party to a suit has a status to move to commit a stranger to the suit for constructive contempt, although no affidavit is filed by him or on his behalf to the effect that the alleged contempt is calculated to prejudice him in his suit.
6. Any person may bring to the notice of the Court any alleged contempt; but, unless the offence is of so serious a nature as to make it necessary to inflict summary punishment in order to prevent interference with the course of justice, there should be no committal.

ARGUED : December 12, 1898.

DECIDED : December 15, 1898.

MOTION by respondent to commit W. H. Ellis and C. H. Lugin, the manager and editor of the Victoria Daily Colonist, for contempt of Court in writing, publishing, and procuring to be published in the said newspaper in the issues of 22nd October, 17th and 22nd November, 1898, articles commenting upon the proceedings herein, and intended and calculated to scandalize the Court, and to prejudice or interfere with the fair trial of the petition; and further, that the said comments were intended by means of calumniating Mr. Justice Martin to deter him from hearing or determining any questions arising herein,

and from determining the questions now pending before him for determination herein.

Affidavits setting forth the articles complained of and going to shew that Messrs. Ellis and Lugin were respectively the manager and editor of the newspaper, were filed and served with the motion.

The articles complained of were as follows:—

Of 22nd October.

“An embarrassment common to every political appointee to a Judgeship was experienced by Mr. Justice Martin yesterday. He did not feel like hearing a motion in an election case, because he had taken an active part in the election. The feeling is natural, but unless the Judge was an agent for a candidate in the case he is not disqualified, and even then he would be disqualified only as to that case. If the election cases are to come to trial, and any way, in view of the probability of the preliminary points coming before the Full Court on appeal, Judge Martin will have to devote his spare moments to schooling himself into forgetfulness of his political career.”

Of 17th November.

“The election protests are pretty well disposed of numerically, but enough remain unsettled to determine the complexion of the Legislature. The certain loss of the seat for Lillooet by Mr. Prentice offsets the success of Mr. Higgins in Esquimalt. There seems to be very little doubt that the seat for North Yale will be given to Mr. G. B. Martin on a recount, and those who are able to form an opinion say that Mr. Booth has nothing to fear from the proceedings instituted to vacate his seat. Pending the determination of the Esquimalt case, the Colonist said that the Government might find itself in a minority of four, and at best they seemed likely to be in at least a minority of two, which would mean that after they had elected a Speaker, supposing that the opposition will permit them to organize the House, they would be defeated by three votes on the Address. Speaking from its own point of view, and without desiring to be understood as expressing the

decision of its political friends, the Colonist thinks it would be good policy on the part of the opposition to force the fighting from the very start. If Mr. Semlin is unable to organize the House, it will be a clear constitutional intimation to the Lieutenant-Governor that he was not warranted in asking Mr. Turner for his resignation, and it would be his duty to send for that gentleman and entrust him with the formation of a new Government. It must be borne in mind that the present House is fresh from the people, and therefore, if Mr. Semlin has not a majority in it, he has no claim to be allowed a dissolution, but it would become the duty of the Lieutenant-Governor to see if any other gentleman is in a position to carry on the Government without a new election."

Of 22nd November.

"The Colonist does not desire to say anything calculated to reflect upon the judiciary of the Province either collectively or individually, but it cannot help thinking that the spectacle just presented of election cases being disposed of by a Judge who was an active partizan in the recent contest is not edifying. We are far from desiring to intimate that Judge Martin will not endeavour to disabuse his mind of any political prejudice, or that he will not succeed in doing so. We do not venture to suggest that he will make any decision in any matter which he ought not to have made or which any Judge in the world would not arrive at under the same state of facts and law. The reference is solely to the public aspect of the matter. Judge Martin was a very active partizan during the late election. He had a perfect right to be so. This does not disqualify him in any way from sitting as a Judge in the election cases. We mean, of course, legally disqualifying him. But his sitting in that capacity does not produce a good impression upon the public mind, and it would be very much better if he could see his way clear to permitting other members of the Bench to take such cases. In making this observation, the Colonist repeats that it fully admits that Judge Martin will undoubtedly

exercise his judicial functions without any desire to favour either one party or the other."

The remaining facts sufficiently appear in the judgment.

VICTORIA, B.C., December 12, 1898.

Hunter, for Messrs. Ellis and Lugin, took the preliminary objections that the Supreme Court had no jurisdiction to commit for constructive contempt, such contempt being a criminal offence as shewn by *O'Shea v. O'Shea* (1890), 15 P.D. at p. 63; *Re Pollard* (1868), 2 P.C. 106; *Ellis v. The Queen* (1892), 22 S.C.R. 7; and since the passage of the Criminal Code, the only remedy for this kind of contempt is by indictment: see secs. 290, 292 and 538. The appointment by the Dominion Government of Mr. Martin as a Judge of the Supreme Court was ultra vires under sec. 7 of the Supreme Court Act, as Mr. Martin had only been called to the bar of this Court on July 30th, 1894, as appears by affidavit filed. In any event, there was no scandalizing of Martin, J., as a Supreme Court Judge; the articles were written of him in his capacity as an Election Judge, and the Election Court is only a court of record when the Judge presides at a trial: see Provincial Elections Act, sec. 237.

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Duff, for the motion. The present mode of procedure is correct; the Criminal Code only deals with libel and not with the offence of prejudicing the fair trial of an action. [DRAKE, J.: The objections are not in my opinion such as to prevent me hearing the motion.] The articles amount to an attempt to prevent Mr. Justice Martin from hearing or in any way dealing with the election petition of *Stoddart v. Prentice*. It is an attempt to alter the course of justice which constitutes a contempt of the highest kind: see *Skipworth's Case* (1873), L.R. 9 Q.B. 230. As to the right of respondent to complain, he cited *Skipworth's Case*, *supra*; *Regina v. Wilkinson*, *Re Brown* (1878), 41 U.C.Q.B. 47; and *Regina v. Ellis*, *Ex parte Baird* (1889), 28 N.B.R. 497.

Hunter, contra. The applicant has no status. The only ground on which a constructive contempt can be complained of by a party to a suit is that the article is calculated to prejudice his case, and no such allegation is made in the affidavits filed. See *In re O'Brien* (1889), 16 Can. S.C.R. at p. 209. The solicitor filed an affidavit to such effect in *Daw v. Eley* (1868), L.R. 7 Eq. 56. There was no reflection on the Court, but merely an expression of opinion that Martin, J., should not exercise any judicial functions in the present case by reason of his prior partizanship—this is fair comment under sec. 293 of the Code. The later cases clearly shew that the Court will not make an adverse order except where there is plainly a gross contempt, and such as is calculated to interfere with justice, and that there is only the summary remedy available: see *Hunt v. Clark* (1889), 58 L.J.Q.B. 490; *The Queen v. Payne* (1896), 1 Q.B. 577; *Fairclough v. Manchester Ship Canal Company* (1896), 13 T.L.R. 56.

VICTORIA, B.C., December 15, 1898.

DRAKE, J.:—This motion is to commit Mr. Ellis and Mr. Lugrin, the manager and editor of the Daily Colonist, for contempt based on the publication of three articles in their paper. There has been a general election in the Province, which resulted in a large number of election petitions. Since the elections and since the filing of these petitions, a gentleman has been raised to the Bench who was alleged to have been an active partizan in the political issues raised at the election, and in the fulfilment of his duties as a Judge of the Supreme Court he has been called upon to adjudicate and make orders in a number of the election cases. On 22nd October the newspaper published an article pointing out the embarrassment which such a position entailed on the Judge, but at the same time indicating that the duty which devolved on him precluded him from refusing to adjudicate in cases brought before him. There is nothing in this article which, in my opinion, can in the slightest

degree be considered as a contempt, or which in any way scandalizes, as the term is, the judicial office. Contempt consists in any conduct which tends to bring the authority and administration of the law into disrespect, or prejudices the parties litigant, or their witnesses. The Courts, and the Judges of the Court, must have the power to deal with questions of this sort in a summary way, otherwise the administration of justice would be impossible, and the trial of cases would be relegated to an irresponsible tribunal, and the judicial office degraded. On 17th November, while the election petition of *Stoddard v. Prentice* was pending, and the judgment of the learned Judge who tried the case was reserved on certain points raised by the parties to the petition, the newspaper took upon itself to determine the result, and boldly asserted that the seat for Lillooet was certainly lost by Mr. Prentice. This was a most improper remark to make under the circumstances. It does not matter whether or not the facts warranted any such assumption, or whether or not the Court would be likely to be influenced by any such prophetic utterance. The public press are not entitled to express an opinion on the result of a matter which is reserved for judicial consideration. They are, it is true, entitled to discuss and comment on judicial decisions as matters of public interest, but not to pre-judge matters which are sub judice.

With respect to the article of 22nd November, headed "A Judicial Anomaly," I do not consider this a reflection on the Court; it merely points out that in the opinion of the writer some other mode of dealing with election cases would be more satisfactory. But at the same time the writer carefully makes his meaning clear that he has no doubt but that the cases will be decided according to the law and facts, thus practically shewing that his objection is a sentimental one, and one that is answered by the article itself. Mr. Duff relied very much on this article as falling within the *Skipworth Case* (1873), L.R. 9 Q.B. 230, but on examination of that case the language used by the defendant was a direct charge that there was no chance of

justice being done by the four Judges who were to sit, and that the Lord Chief Justice was not a proper person to try anything in connection with the *Tichborne Case*.

Blackburn, J., in rendering judgment, points out that when statements are made to the obstruction of justice, it is a contempt of a serious character, although the language used may not have the slightest effect on the result. The Court does not consider whether the allegations are true or false, it only has to see whether there is an attempt to interfere with the course of justice. A Judge cannot meet his traducer in the columns of the press; it is not a question of his own dignity, but of that of the Court of which he is a member. Lord Justice Cotton, in *Hunt v. Clarke* (1889), 58 L.J.Q.B. 490, says: "In my opinion no application to commit for contempt ought to be made unless the offence was of so serious a nature as to render the exercise of this summary power necessary to prevent interference with the course of justice." Applying this language to the case before me, I do not see anything in the articles referred to which can be said to fall within the scope of this language. It is true a technical contempt has been committed, but not of such a character as calls for the extreme measure of committing the parties to prison. I think the case will be fully met by making no order on this motion, the result of which will be that each party will have to pay their own costs. I have to notice the objection taken by Mr. Hunter. His first argument is that the contempt being of a quasi criminal nature, should be proceeded with by indictment. Blackburn's exhaustive discussion of the reasons why the Courts have the power of dealing with questions of contempt in the *Skipworth Case* (1873), L.R. 9 Q.B. 230, is a sufficient answer. He next contends that secs. 290 *et seq.* of the Criminal Code shew that the proceedings should be by indictment. These sections refer to libel and not to contempt. He then contended that Mr. Justice Martin was not properly appointed, as he was not of the standing indicated by sec. 10 of ch. 56 R.S.B.C., 1897. This is a subject which I cannot discuss. The appointment having been made by the

Governor-in-Council, cannot be reviewed by this Court; and as to the status of the person raising a question of contempt, it is clear from the authorities that any person can bring to the notice of the Court any alleged contempt. The objections are therefore overruled.

Judgment accordingly.

Note: *Contempt of Court—Newspaper comment.*

Contempt of Court is a criminal proceeding: *Ellis v. The Queen*, 22 Can. S.C.R. 7; *Re Scaife*, 5 B.C.R. 153. It is therefore necessary that the charge should be proved with particularity: *Re Scaife*, 5 B.C.R. 153.

Where the alleged contempt consisted in the publishing, in a newspaper, comments on a judgment rendered by a Master in Chambers in a cause in which the writer was solicitor for the defendant, but after the proceedings in the cause before the Master were ended, it was held by the Supreme Court of Canada that the relator in the cause could not be prejudiced as a suitor by the publication complained of, and as such prejudice was the only ground on which he could institute proceedings for contempt he had no *locus standi*, and his application should not have been entertained: *Re O'Brien, Regina ex rel. Felitz v. Howland*, 16 Can. S.C.R. 197, reversing 11 Ont. R. 633 and 14 Ont. App. 184.

Where the respondent in a controverted election case applied for an order *nisi* calling on the defendant, his opponent at the election, to shew cause why he should not be committed for contempt of Court for publishing articles in his newspaper reflecting on and prejudging the conduct of the respondent and of the returning officer during the currency of the proceedings on the election petition, it was held, although a *prima facie* case of contempt had been made out, that as it appears on the same material that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer and presenting him with a gold watch as a mark of such public approval, the applicant was also in fault, and his application was therefore refused: *Re Bothwell Election Case*, 4 Ont. R. 224.

In New Brunswick the practice has been to issue an attachment against the person publishing the newspaper comment complained of, the award of the attachment not being a final judgment but a method of bringing the party into Court where he may be ordered to answer interrogations, and by his answers purge his contempt if he can. If he were unable to then purge his contempt the Court would then pronounce sentence: *Ellis v. Baird*, 16 Can. S.C.R. 147.

An appeal does not lie to the Supreme Court of Canada from a judgment in proceedings for contempt of Court unless it comes within the provisions

Note—Continued.

of the Supreme Court Act as to appeals in criminal cases: *Ellis v. The Queen*, 22 Can. S.C.R. 7; *O'Shea v. O'Shea*, L.R. 15 P.D. 59.

Any publication, whether by parties or strangers, which concerns a cause pending in Court and has a tendency to prejudice the public respecting its merits and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses or the counsel, may be visited as a contempt: 2 Bishop's Criminal Law, 2nd ed., sec. 216; *Little v. Thomson*, 2 Beav. 129; *Re Crawford*, 13 Jurist 955.

Where the defendant to a proceeding by way of criminal information, immediately before the trial distributed handbills in the assize town vindicating his own conduct and reflecting on that of the prosecutor, the Court found that the motive was to influence the jury in his favour at the trial and granted a criminal information against him in respect thereof: *R. v. Joliffe*, 4 T.R. 285. And a criminal information has been granted for publishing an invective against judges and juries in general, the Court treating such publication as made with intent to bring into suspicion and contempt the administration of justice: *R. v. White*, 1 Camp. 359.

An advocate who publishes in a newspaper, letters containing libellous, insulting and contemptuous statements and language concerning one of the justices of the Court in reference to the conduct of said justice, while acting in his judicial capacity on an application made to him in Chambers for a writ of *habeas corpus*, is guilty of contempt: *Regina v. Ramsay*, L.R. 3 P.C. 427; 11 L.C. Jurist 152; but the proceedings should be taken before the full Court: *Ibid.*

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE MARTIN, J.

COOKSLEY v. NAKASHIBA.

B.C. Summary Convictions Act—Appeal—Case stated—Transmitting case to District Registry.

1. The provision in sec. 87 of the B.C. Summary Convictions Act, that the appellant shall, within three days after receiving the case stated, transmit it to the District Registry, is a condition precedent to the jurisdiction of the Court to hear the appeal.

DECIDED: July 17, 1901.

This was an appeal, by way of case stated, from a conviction made on the 18th day of June, 1901, under the Immigration

Act, B.C. Stat. 1900, ch. 11, by George Pittendrigh, Stipendiary Magistrate sitting at New Westminster.

The magistrate signed a case stated on the 27th of June, and accepted appellant's solicitor's undertaking for costs in lieu of recognizance provided by sec. 87 of the Summary Convictions Act. It appeared also that the appellant had not filed the case in the New Westminster Registry, as provided for by sec. 86 of the Summary Convictions Act, but he did, however, on the 15th of July, 1901, obtain leave from Martin, J., to file the case in the Vancouver Registry, which was done.

Wilson, K.C. (Bloomfield, with him): The appellant has not complied with the conditions precedent to the appeal, and this Court therefore has no jurisdiction: see *Morgan v. Edwards* (1860), 29 L.J.M.C. 108.

He was stopped, and the Court called on

J. A. Russell, contra: Leave has been given and an order entered transmitting the case, and it has been filed in the Vancouver Registry as ordered. The order also fixes the time for hearing the argument on this appeal.

July 17, 1901.

MARTIN, J.:—The transmission of the case to the proper Registry as required by sec. 86 is a condition precedent to the jurisdiction conferred by secs. 90 and 92, and since that provision of sec. 86 has not been complied with I cannot entertain the appeal. *Morgan v. Edwards* (1860), 29 L.J.M.C. 108, is in point.

Objection allowed.

[HALIFAX COUNTY JUDGE'S CRIMINAL COURT,
NOVA SCOTIA.]

BEFORE HIS HONOR W. B. WALLACE, COUNTY JUDGE.

THE KING v. HAVERSTOCK.

Theft of bank notes—Searching prisoner after arrest—Identification of property—Want of evidence—Order for restitution of stolen property—Order for return to convicted prisoner of money found on him—Compensation for loss of property—Cr. Code secs. 344, 836, 838.

1. To entitle the aggrieved party to an order for the restitution to him of money found on the prisoner convicted of stealing money from the person, proof must be adduced identifying the money so found as the money which was stolen.
2. Where the accused was convicted of the theft of bank notes but there was no evidence to identify the same with the bank notes found on and taken from the prisoner at the time of arrest, and no application was made immediately after the conviction for an order of compensation to the prosecutor for his loss, an order may be properly made *ex parte* for the restoration to the prisoner of the money so taken for him.

DECIDED: May 19, 1901.

The prisoner was tried in June, 1900, before His Honor J. W. Johnston, Judge of the County Court for the Metropolitan County of Halifax, and was convicted for stealing from the person.

At the trial the prosecutor testified that bank notes to the value of \$70 were taken from him, and he stated the denomination of the notes. Another witness testified that when the prisoner was arrested she was searched and \$28 were found on her, some of the money being in notes of the same denomination as the stolen notes.

The money found on the prisoner was not produced at the trial, nor was any evidence given to identify the notes found on the prisoner as the stolen notes.

Foley, for the prisoner, some weeks after the conviction, obtained an *ex parte* order from Judge Johnston, directing that the money found upon the prisoner should be restored to her.

Lenoir, Crown Prosecutor, moved to set aside this order on the ground that the evidence given established a sufficient identification of the money and would justify the granting of an order to deliver the money to the prosecutor.

Foley, for the prisoner, contended that an order for restitution should not be granted unless the property were produced at the trial and identified as part of the stolen property: Code sec. 838; *Reg. v. Goldsmith*, 12 Cox 594; *Regina v. McIntyre*, 2 P.E.I. Rep. 154, cited approvingly by Taschereau in his Commentaries on the Code at page 904, and *Reg. v. Smith*, 12 Cox 597.

Judgment was reserved and the learned Judge died without delivering judgment. The motion was renewed before his successor, Judge Wallace.

HALIFAX, N.S., May 19, 1901.

WALLACE, County Judge, dismissed the application to set aside the *ex parte* order and made an order for restitution to the prisoner, on the ground that after perusing the evidence he could find no proof that the money found on the prisoner belonged to the prosecutor, and Code sec. 838 authorized the restitution of the stolen property only on such proof.

No application had been made by the prosecutor immediately after the conviction of the prisoner for compensation for loss of property under sec. 836 of the Code.

Application dismissed.

Note: *Theft of money—Compensation or restitution—Identification—Cr. Code secs. 836, 838.*

Where it is impossible to identify the money found on the prisoner as the stolen money, and the prisoner claims the money as his own, the proper course for the prosecutor to take is to apply, under sec. 836 of the Code, immediately after the conviction of the prisoner, for compensation for loss of property, and thus obtain an order that the money of the prisoner shall be paid to him to such extent as will compensate him for the loss sustained.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, C.J., HANINGTON, LANDRY, MCLEOD,
AND VAN WART, JJ.

Ex parte McCLEAVE.

Canada Temperance Act—Keeping liquor for sale—Search warrant—Order for the destruction of the liquor—Disqualification of prosecutor, though a peace officer, to execute order.

1. The prosecutor of a charge of keeping liquor for sale contrary to the Canada Temperance Act, being personally liable for costs in the event of the prosecution failing, is, though a peace officer, disqualified from executing a search warrant or an order for the destruction of the liquor in respect of which the information was laid.

ARGUED : November 8, 1899.

DECIDED : February 9, 1900.

On the 5th of August, 1899, an order nisi for a certiorari was made by Mr. Justice Landry. The defendant was convicted on the 26th day of May, 1899, for keeping liquor for sale contrary to the provisions of the Canada Temperance Act. An order was made on the same day for the destruction of the liquor, and it was destroyed. Several grounds were urged why the order to destroy the liquor was bad. First, the order for destruction and forfeiture was bad because the liquor and vessels in which it was contained had never been properly before the magistrate. (a) Search warrant bad, as there was no information by a credible witness as required; (b) search warrant, if executed at all, was executed by informant himself, and this is illegal. Second, it does not appear that the accused kept this particular liquor for sale. Third, the magistrate had no jurisdiction to order the liquor to be kept in the custody of the informant, and it was therefore illegally detained. Fourth, that the order was bad in ordering the liquor to be destroyed by the informer himself.

FREDERICTON, N.B., November 8, 1899.

W. B. Chandler shewed cause against an order nisi granted by Mr. Justice Landry in Chambers on the 5th day of August

last, calling upon James Kay, stipendiary and police magistrate of the city of Moncton, to shew cause why a certiorari should not issue to bring into this Court a conviction made by him, as such stipendiary and police magistrate, upon the 26th day of May last, against the applicant for keeping liquor for sale contrary to the provisions of the Canada Temperance Act ; also an order for the destruction of the liquor so kept for sale.

M. G. Teed, in support of the order.

FREDERICTON, February 9, 1900.

TUCK, C.J. (dissenting):—Practically the case was argued by Mr. Teed in support of the order nisi on the last point, namely, that the proper administration of the law requires that the officer interested, that is the informant, should not destroy the liquor. With all due respect to Mr. Teed and his argument, I can not adopt this view. I should regret to have to come to the conclusion that the informant has such an interest in the destruction of the liquor as to prevent him doing his duty. On the contrary, he is just the man to execute the judgment of the Court. He knows the facts, and, if the Act of Parliament is to have any force at all, it should be allowed to operate without being hampered by unreasonable technicalities.

The rule must be discharged.

HANINGTON, J.:—This is a motion for a certiorari to remove and quash a conviction for illegally keeping liquors for sale contrary to the Canada Temperance Act, and an order for the destruction of the said liquors.

The informer, Belyea, a police officer, made the complaint, obtained the search warrant to himself, took it for execution, and under it searched the premises, found and seized certain liquor as that complained of, took it and delivered it to the justice, and thereupon made a complaint for its forfeiture and destruction, got an order for such destruction, which was issued to himself, and thereunder took and destroyed the liquor. The question is, can the complainant, although a peace officer, take these proceedings, be his own executive officer, and as such

execute the warrants and orders he, as prosecutor, obtained, and his acts in that respect be legal. The prosecution rely upon a judgment of Mr. Justice Robertson, in the Queen's Bench Division of Ontario, in the case of *Reg. v. Hefferman*, 13 O.R. 616. That learned Judge does there hold that, though objectionable, the informer, if a police officer, may execute his own warrants of search and destruction. His reasons for holding such a case to be outside the principles, which at common law prevent officers, such as sheriffs, etc., from executing their own processes or those obtained by their kin, are that he, acting in an official and public capacity, had no private or pecuniary interest to serve, and he should suppose that the fact of his being the chief constable of the city would afford some guarantee that he would discharge the duty imposed upon him with decorum and in the least offensive way possible. I can not agree that any such supposed guarantee is enough to allow any prosecutor (personally liable to costs if his prosecution fails, and for damages if his conduct is illegal, either of which facts would disqualify any high sheriff) to say that they do not disqualify an officer of the police of the city. If he, as such public officer, undertakes the prosecution, he could have no difficulty in getting a sheriff or constable to execute the warrants and orders, and I think he should do so. If, as Mr. Justice Robertson says, it is objectionable, it is well, I think, to adhere to the common law principles, which, if followed, would leave nothing to be objected to. Under a warrant of this description the executive officer has great powers, even to breaking outside doors, has to exercise discretion, and to determine and adjudge that he has found the liquor complained of. Any official clothed with such powers and duties should, I think, be entirely free from interest, bias or prejudice, which he in law can not be when he is interested in fact, executing his own warrants and orders.

In this case the informer, liable for costs and at a risk of damages, was, it seems to me, in a much more improper position when executing these warrants and orders obtained for himself on his own complaint, than the sheriff could be as an inspector

of an insolvent estate, as he was in the case of *Fairweather v. Nevers*, 2 Pugs. 524. In that case the sheriff was held incompetent to execute a writ of replevin, and the execution of such writ by him was held bad. When in the argument it was said, suppose the sheriff was interested, would that prevent him from serving a writ, Ritchie, C.J., says: "That is not the question, but I take it, if the sheriff issued the writ at his own instance and served it, it would be bad." In the judgment the Chief Justice says: "And, as it is one of the fundamental principles of the administration of justice that those who are called upon to administer the law and decide the rights of parties, should be entirely free from interest, we do not think the inspector of this estate was a proper person to preside as sheriff. The proceedings are irregular in the writ being directed to him, and it must be set aside."

If these are common law principles, as they no doubt are, applicable to a high sheriff, who was by the Court held to be a ministerial officer only, how much more should they be applicable to a policeman, who had, as the executive officer, as much or more discretionary duties to discharge under these warrants and orders executed in this matter than a sheriff in replevin?

In *Condell v. Price*, 1 Hans. 333, it was held that a constable could not act or hold a defendant in arrest in his own case. Allen, J., says:—"It is true that the defendant may in fact have been a constable, but the alleged acting as a constable was in a case where he was the plaintiff, and therefore he could not act as constable." And he was therefore held not entitled to notice of action. That case decided that he had no jurisdiction to act; had he had jurisdiction, and reasonably thought he was acting as constable, he would have been entitled to notice of action. In *Hamilton v. Calder*, 23 N.B.R. 373, it is laid down as the duty of a constable on a search warrant that some one (the owner, if he is complainant), who can point the goods out, usually accompanies the officer in the execution of the warrant for the purpose that on his own pointing and declaration the officer may judge whether or not they are the goods mentioned in the warrant. His duty is to judge and determine

them to be such goods before he takes or removes them. *Ryan v. Turner*, 30 N.B.R. 114, also determines that where the sheriff was bondsman in an election petition, he was disqualified from acting, even to the extent of posting notices of the filing of the petition, and the whole proceedings were set aside.

If the exercise of discretion in the posting of notices was a judicial act, as no doubt it was enough to disqualify the sheriff, how much more are the duties the prosecutor here discharges, or should have discharged, in the execution of the warrant and order issued against McCleave and his property? Mr. Justice Fraser, delivering the judgment of the Court, at page 117 of the case, held, citing well-known authorities—7 Bac. Abr. Title "Sheriff," (M), and 1 Ch. Arch. (8th ed.) 284—that even if the duties were ministerial, the sheriff being interested, could not act.

I am fully convinced that the acts here complained of are illegal, and orders based on the informer's action as an executive officer in his own case are void, and he could not here justify under them. It appears to me that if we do not adhere to the well-established rules and principles of law in such or the like cases, we are opening a broad door not only for scheming and imposition, but also for flagrant abuse of the process of the Court and of the administration of the law. A recent case tried before me confirms my opinion. In that case the professed constable, on his own statement of the facts, got a friend to make a complaint, and thereupon obtained a warrant against a woman, innocent of any offence, for an alleged crime. He then, upon that warrant, after making false assertions to her as to other warrants being out against her, arrested her, brought her before a (to him) friendly justice, and, under misrepresentation as to the seriousness of her offence, terrified her into paying a sum of money, which the complainant, constable, and justice divided among themselves. There are always disinterested officers available to execute bona fide processes. Whatever may be said of the progress of the age, which we all admit, it is as important now to adhere to the well-tried principles of independent and disinterested adminis-

tration of justice by all who have authority therein, as it ever was; and it is well to let it be clearly understood that the execution of warrants and processes of courts must be placed in the hands of and executed by disinterested officials.

The rule should be made absolute.

MCLEOD, J. (dissenting):—The defendant, on the 26th day of May, 1899, was convicted before James Kay, Esquire, stipendiary and police magistrate of the city of Moncton, for keeping intoxicating liquor for sale contrary to the provisions of the Canada Temperance Act. An order nisi to set aside the conviction was granted on the following grounds: 1st. The order of forfeiture is bad, the liquor and vessels never having been properly before the magistrate. (a) Because the search warrant is bad, there being no information by a credible witness as required by the Act. (b) Because the search warrant, if executed at all, was professed to be executed by the informant, which is bad and illegal, and its execution a nullity in law and the goods illegally before the magistrate. 2nd. That it does not appear that the accused was convicted for keeping this particular liquor for sale. 3rd. That the magistrate had no jurisdiction to order the liquor, when brought before him, to be kept in the custody of the informant, and the liquor was, therefore, illegally detained. 4th. That the order is bad in ordering and directing the liquor to be destroyed by the informant himself.

I do not think that there is anything in any of the objections taken. The information was laid by Abram Belyea, and there is nothing to shew that he is not a credible witness or such a witness as under the Act might lay the information. It is in the form prescribed by the Act. The search warrant was in the prescribed form, and was directed to all or any of the constables or other peace officers in the said county of Westmorland. Belyea and two police officers of Moncton (Milner and Rushton) went to the defendant's hotel, found the liquor, and the evidence that it was kept for sale. They then took it to the police station and locked it up, and Belyea laid the information.

On the trial the defendant, who was represented by counsel, offered no defence; indeed, his counsel said they had no defence to make, and the defendant was convicted and fined and an order made directing Belyea to destroy the liquor. The liquor and vessels were all in the police station in the custody of the Court. I think there is nothing in this to affect a conviction for keeping liquor for sale, if there was evidence that it was kept for sale, and of this there seems to have been ample evidence. There is nothing in the second and third objections. As to the fourth objection; I think that the magistrate had power under sec. 109 of the Canada Temperance Act to order Belyea to destroy the liquor; but at all events it can not affect the conviction. In *Ex parte Balser*, 27 N.B.R. 40, the information was made by the person who afterwards, as constable, executed the warrant and arrested the defendant. Allen, C.J., says, at p. 42: "On the other objection that the constable who arrested the defendant was also the informer, and consequently the arrest was illegal, that would be no objection to the conviction, which does not depend on the legality or illegality of the defendant's arrest." So I think in this case the conviction depends on whether or not there was sufficient evidence that he kept the liquor for sale, and, as I have said, I think there was. I think, therefore, that the rule should be discharged.

LANDRY and VANWART, JJ., agreed with HANINGTON, J.

Rule absolute for a certiorari.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ROBERTSON, J.

BEFORE STREET AND BRITTON, JJ.

THE KING v. KEEFER.

Election of trial without jury—No right to re-elect—"Speedy trial"—Mandamus—Crim. Code 767 (5) (amendment of 1900).

1. Where a prisoner on arraignment before the County Court Judge elects in favor of a speedy trial under Part LIV. of the Code, he cannot withdraw the election so made and obtain a trial by jury.
2. Sub-section 5 of Code sec. 767, as amended 1900, gives the accused the right of re-election only in case his first election was for trial by jury.

ARGUED: October 22 and November 4, 1901.

DECIDED: October 24 and November 4, 1901.

In the matter of two indictments pending in the county Judge's criminal court in and for the county of Wentworth a motion was made for a mandatory order directing the Judge of the county court of Wentworth to hear an application on behalf of the accused to allow them to withdraw their election for trial before him, without a jury, upon the said indictments, etc.

The facts were as follows: Each of the accused was charged before the police magistrate for the city of Hamilton on separate indictments with stealing four tubs of lard and two cheeses, and on the trial before the police magistrate both declined to elect, and were committed for trial; subsequently they were both brought before the county court Judge under the Speedy Trials Act, and elected to be tried by him without a jury: afterwards on the day appointed for the trial, and when the trial was about to proceed, counsel for the accused made an application to the Judge for leave to withdraw the election for trial without a jury, and to be allowed to re-elect, which application the Judge refused to hear, and delivered the following judgment: "I refuse to hear an application to allow either Alexander Keefer or Arthur Clark to withdraw his election for

trial without a jury, or to re-elect, as they have both already elected to be tried by me without a jury, after being properly addressed by me, as required by the Code, and my ground for refusal is, that I have no discretionary power to allow them to withdraw the election they have made, or to make a further election."

The motion for a mandatory order was heard by ROBERTSON, J., in Chambers, on the 22nd October, 1901.

J. V. Teetzel, K.C., for the accused, referred to Crankshaw's Criminal Code, 2nd ed., pp. 868 to 871, inclusive; *Regina v. Prevost* (1895), 4 B.C.R. 326; *Regina v. Burke* (1893), 24 O.R. 64; *Regina v. Ballard* (1897), 28 O.R. 489, 1 Can. Cr. Cas. 96.

J. R. Cartwright, K.C., for the Crown. The object of the Act was to allow speedy trials, and to save expense. The Legislature, after the decision of *Regina v. Ballard*, saw fit to extend the provisions so as to enable an accused, after electing to be tried by a jury, to withdraw that election, and to avail himself, notwithstanding his previous election, of the right to be tried by the county Judge without a jury, but it went no further. If the Legislature had intended to meet a case like the present, it must be presumed that it would then have so declared. Moreover the royal writ of mandamus will not be ordered unless there is a duty imposed upon the Judge to perform some legal act, which he has declined to perform. Here the learned Judge has no power to allow the accused to withdraw their election. The statute is silent as to a case like the present.

TORONTO, October 24, 1901.

ROBERTSON, J.:—As I understand the facts, at the time of the application made to withdraw their election, the accused were still on bail, and had not surrendered or been surrendered to the custody of the sheriff; it being so stated by counsel before me, although they were before the Judge for trial. Here there never was an election to be tried by a jury, so that sub-sec. 5 of sec. 767 of the Code, which is the amend-

ment made to the Code by the Criminal Code Amendment Act, 1900, does not apply; therefore the accused could not be proceeded against as if their first election had not been made: their application to the Judge, when brought up for trial, after the record had been made out, and the Crown ready to proceed with the trial, is not contemplated or provided for by the Act.

The Court was then constituted under sec. 772 for the trial of the accused; they had already been arraigned under sec. 767, and were then admitted to bail, and even had they been committed without bail, there is no provision then, after the sheriff has once acted, to compel him to bring them up before the Judge a second time, to enable them to change their election from trial by Judge to jury, but, had they at first elected to be tried by a jury, they might, notwithstanding such election, change their minds, and take advantage of the amending sub-sec. 5 of sec. 767, the spirit of the Act being to allow a speedy trial. It cannot be invoked, however, to delay the trial, after the accused have once elected to be tried speedily. The whole of the powers conferred upon the Judge as regards the arraignment of the accused and their trial, are statutory powers, and he has no discretion as to such an application as is now made, in these cases.

The Act does not contemplate that there should be a withdrawal of the election to be tried by the Judge without a jury, but full provision is made for re-election in case of an election to be tried by a jury (see sub-sec 5 of sec. 767), and the reason is obvious. After such latter election, the accused may find that he will have to wait weeks, or perhaps months, before a trial by jury can be had, and rather than defer the trial until that event happens, the statute provides for his surrendering himself to the custody of the sheriff, should he be out on bail, or if already in custody, and to intimate to the sheriff, or notify him that he desires to re-elect, whereupon it then becomes the duty of the sheriff and Judge to proceed as directed by sec. 766, and thereafter (unless the Judge, or the prosecuting officer acting under sub-section 2 of that section, is of opinion that it would not be in the interests of justice that the prisoner should be

allowed to make a second election) the prisoner shall be proceeded against as if his first election had not been made. The words "unless the Judge, or the prosecuting officer acting under sub-section 2 of that section, is of opinion that it would not be in the interests of justice that the prisoner should be allowed to make a second election," are to be read as in parenthesis.

So long as the statute does not provide expressly for the case presented here, I do not see how, by analogy or otherwise, it can be concluded that an accused can claim as a right to be allowed to withdraw an election duly made to be tried by the Judge, and to re-elect to be tried by a jury. The proceeding before the Judge when the sheriff brings the accused before him for election is matter of record. Section 764 declares that the Judge sitting on any trial under this part of the Act, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a court of record, and the record in any such case shall be filed among the records of the court over which the Judge presides, as a part of such records. Then sec. 767 provides for the arraignment of the accused before the Judge, and by sub-sec. 3 of that section, it is provided that upon the accused consenting to be tried by him without a jury, the prosecuting officer shall prefer the charge against him, and upon being arraigned, he pleads. The record is drawn up in the form MM or NN, and the trial proceeds, and the finding of the Judge is entered on the record, etc.

Now, in my judgment, when the accused elected to be tried by the Judge without a jury, from that moment the Judge became seised of the case, and the trial had begun. A day was appointed later to have the witnesses *pro* and *con* brought before the Court. But the trial in fact was begun and proceedings taken in the Criminal Court so soon as the accused elected to be tried by that forum; he had no right after that to say "I have changed my mind;" if he could after the trial had begun, he could do so at any stage of it, before the Judge had pronounced upon the evidence. And, if that could be, the proceeding in the county Judge's criminal court would become a travesty on the administration of justice.

On the whole, after giving the statute and the several cases cited the best consideration of which I am capable, I think the motion must be refused with costs, and the trial must proceed before the county Judge's criminal court.

The defendants appealed from the order of ROBERTSON, J., and their appeal was heard by a Divisional Court composed of STREET and BRITTON, JJ., on the 4th November, 1901.

The same counsel appeared.

THE COURT gave judgment immediately after the argument, holding that the provisions of secs. 762 *et seq.* of the Criminal Code being explicit and not in any way authorizing or referring to an application to withdraw an election to be tried before a Judge, such an election having once been made cannot be withdrawn. It is a matter for legislative enactment as in the amendment to sec. 767 with regard to elections to be tried by a jury. The appeal should be dismissed without costs.

Mandamus refused.

Note: *Electing mode of trial—Speedy Trials procedure—Cr. Code sec. 767.*

If the accused has elected to be tried by jury, he may still re-elect under sub-section (5) at any time before his trial has commenced. This sub-section was added to the Code by the Code Amendment Act of 1900. Before that amendment it had been held in Ontario that a person arraigned before the county judge, and electing against a speedy trial without a jury, had no absolute right after being remanded to re-elect, and that his reply upon arraignment that "for the present" he elected to be tried by jury was a sufficient election: *R. v. Ballard* (1897), 1 Can. Cr. Cas. 96, 28 Ont. R. 489. A different view was taken by Crease, J., in *R. v. Prevost* (1895), 4 B.C.R. 326, where it was held that a prisoner who had elected to be tried by a jury, might afterwards re-elect in favour of a speedy trial on application for leave to abandon his former election, and that the Court would have inherent jurisdiction over the sheriff, as its officer, to direct him to produce the prisoner. Parliament then passed the amending statute, which, however, is limited to cases where the prisoner has elected to be tried "by jury," and under the maxim "*expressio unius, etc.*," it must be taken that the power of re-election so given shall not apply in cases of election of trial without a jury.

It had been held in Nova Scotia that the election could only be made by a person actually and formally committed for trial and not by a person admitted by the magistrate to bail: *R. v. James Gibson*, 3 Can. Cr. Cas. 451;

Note—Continued.

E. v. Smith, 3 Can. Cr. Cas. 467; although a different rule was laid down in *E. v. Lawrence* (1896), 1 Can. Cr. Cas. 295, per McColl, J. (B.C.). In the latter case it was held that the words "committed to gaol for trial" should be construed as including any case where the accused is found in custody charged with an offence in respect of which he has the right to elect in favour of a speedy trial, notwithstanding that he is so in custody by reason of his surrender (after being admitted to bail) for the purpose of appearing before the judge to elect to be tried without a jury under the speedy trial clauses of the Code. That question was set at rest by an amendment in 1900 of Code sec. 765, sub-sec. (2) of which now provides that a person who has been bound over by a justice under the provisions of sec. 601, and has either been unable to find bail or been rendered by his sureties, and is in custody on such charge, or who is otherwise in custody awaiting trial on such a charge, shall be deemed to be committed for trial within the meaning of sec. 765.

Inasmuch as the "charge" in the County Judge's Criminal Court must, under that section, be prepared from "the depositions," it is doubtful whether an accused person, committed by consent upon a preliminary inquiry at which no evidence was taken, such evidence being waived by the prisoner, has a right to elect in favour of a speedy trial without a jury. In *E. v. Gibson* (1896), 3 Can. Cr. Cas. 451, it was held that he had not, but quære whether the sworn information is not a part of the depositions sufficient in such case for the drawing of the "charge."

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, J., GRAHAM, E.J., AND MEAGHER, J.

THE QUEEN v. VANTASSEL (No. 1.)

Summary conviction — Pecuniary penalty — Imprisonment in default of distress — Costs of distress and conveying to gaol obligatory — Non-inclusion in minute of conviction — Variance of conviction from minute — "Costs and charges" — "Expenses" — Cr. Code, secs. 871, 872 (a) — Code forms WW and FFF.

1. If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction.
2. It is unnecessary for the justice to insert in the minute of conviction any provision that the defendant shall pay such costs of distress and conveying to gaol, as a pre-requisite to his discharge from custody before the end of the term of imprisonment.
3. The formal conviction may provide under Code sec. 872 (a) for the payment of the costs both of the distress and of conveying to gaol, although the minute of conviction does not include the costs of distress but merely directs imprisonment unless the penalty and costs and the costs of conveying to gaol are sooner paid.
4. The expression "costs and charges" used in Code forms WW and FFF has the same meaning as the term "expenses" in Code sec. 872 (a).

ARGUED : January 26, 1894.

DECIDED : March 19, 1894.

Appeal from a decision of Townshend, J., refusing an application for a writ of certiorari to bring up a conviction for selling intoxicating liquors contrary to the provisions of the Canada Temperance Act, one Trask being the prosecutor in the case.

The conviction provided for the imprisonment of defendant for the period of forty days, "unless the said sums" (the penalties and costs of conviction) "and the costs and charges of the said distress and of the conveying of the said M. H. Vantassel to the common jail shall be sooner paid."

The minute of conviction, after providing for the forty days imprisonment, added, "unless the said sums and costs of conveying to the said jail the said defendant shall be sooner paid."

The decision appealed from was as follows :—

TOWNSHEND, J.:—

Application for writ of certiorari to bring up conviction on the ground principally that the conviction adjudges the defendant to pay costs of distress in addition to other penalties. It is contended that the payment of such costs is not authorized by the Dominion Act of 1888, ch. 34, sec. 14, form T.

The case of *The Queen v. McFarlane*, 24 N.S.R. 54, is referred to as authority that the conviction is bad unless exactly following the form authorized by the Act in question. Mr. Justice Ritchie dissented from that view, holding that the particular form was only made sufficient.

In the later case of *The Queen v. McDonald* and others at the present term (26 N.S.R. 94), Mr. Justice Graham, who delivered the opinion of the majority in *The Queen v. McFarlane*, modifies the view he then expressed, holding that the form may be moulded to suit the circumstances of the case; and the Court were unanimous in holding that the omission of the provisions in form T, of the costs of conveying defendant to gaol, did not invalidate the conviction. He further adopts the view of the Supreme Court of New Brunswick in *Ex parte Whalen*, 29 N.B.R. 133, in which the Court held that form T, Acts 51 Vict., ch. 34, is not applicable to a case where the justice does not adjudge payment of costs of commitment and conveying defendant to gaol. They further held that the costs of distress are not in the discretion of the justice under sec. 66 Summary Conviction Act.

Taking, as I do, this view of the law, and holding that the later judgments of our own Court are in accordance with it, I am of the opinion that the insertion of the costs of distress does not invalidate the conviction.

I may add that if sec. 872 of the Criminal Code, which came into force July 1st, applies to proceedings under the Canada Temperance Act, then the conviction is in all respects regular; but there may be a question for discussion on its applicability, to which I do not think it necessary to refer.

Sec. 537 Criminal Code makes all its provisions applicable, which would include the Canada Temperance Act.

It is contended there is no evidence that the Canada Temperance Act is in force in the town of Digby, nor is there any allegation to that effect in the conviction. The allegation is distinctly that "The Canada Temperance Act then in force in said town and county of Digby," and the justice is bound to take judicial notice that it is in force if it is a fact.

The evidence as to the sale is to my mind sufficient, and the magistrate is the person appointed by law to decide that fact. *The Queen v. McDonald*, 7 R. & G. 336, is not applicable to the facts here.

The mayor was duly authorized to adjourn the Court and to act in the absence of the stipendiary, and therefore no effect can be given to this objection.

I think it clearly appears from the summons that the police court in the town of Digby is the place where the defendant is summoned to appear.

The summons states that the town of Digby is in the county of Digby. I don't think it is necessary to prove that fact.

I think on all points defendant must fail, and this application should be dismissed with costs.

HALIFAX, January 26, 1894.

W. B. A. Ritchie, Q.C., in support of the appeal.

C. S. Harrington, Q.C., and *H. McInnes*, contra.

HALIFAX, March 19, 1894.

GRAHAM, E.J., delivered the judgment of the Court as follows:—

This is an appeal from a judgment refusing a writ of certiorari. The chief ground is this:—The defendant, by the terms of the conviction, is to be imprisoned for "forty days unless said sums" (the penalties and costs of the convictions) "and the costs and charges of the (said) distress, and of the conveying of the said M. H. Vantassel to the (said) common

jail shall be sooner paid;" whereas, the language of the Act, Criminal Code 872 (a), provides for imprisonment unless the penalty and costs, if costs are ordered, "and the expenses of the distress and of conveying the defendant to jail are sooner paid." The argument is that the expression "costs and charges" there means something more than "expenses" which, only, the Act allows.

In the previous section there is a tariff of fees. Item 11 of "Fees to be taken by justice of the peace," is, "For each warrant of distress or commitment \$0.25." Item 5 of constables' fees is, "Mileage taking prisoner to jail, exclusive of disbursements necessarily expended in his conveyance, \$0.10." And item 9, "Serving warrant of distress and returning same, \$1.00. Item 10, "Advertising under warrant of distress, \$1.00." 11, "Travelling to make distress or to search for goods to make distress where no goods are found (one way) per mile, \$0.10. 12, "Appraisements, two cents in the dollar, etc." 13, "Commission on sale and delivery of goods, etc., 5 cents in the dollar."

These items shew that the justice and the constable receive sums of money in connection with the distress and conveyance to jail.

If "expenses" means something less than "costs and charges," and some of these items are to be paid in the first instance by the prosecutor and to be recovered from the defendant, and in respect to some there is no recourse over against the defendant, there would not seem to be any good reason for such a distinction.

The form of the conviction authorized by the Summary Convictions Act is to be found at page 341 of the Code [form WW], and the warrant of commitment on page 349 [form FFF]. In these forms the expression is "costs and charges" and not "expenses" as in the Code. The legislature, in providing a form containing that expression, to carry out a provision where the word "expenses" alone is used, must have considered that the two expressions were synonymous, or meant the same thing. It would presumably not provide a

form which, if followed, the courts must immediately declare to be bad.

True the expression "expenses" is a change from former legislation, but it is to be expected that in the preparation of a Code, when it becomes necessary to reduce the law to as few words as possible, the legislature would find it necessary to introduce verbal changes. "Expenses" is not an inapt word to cover the expenditure made in connection with the items which I have mentioned. I believe it is a word frequently used in the Scotch Courts where the English Courts would use the word "costs."

Then there is a variance between the minute of conviction and the conviction. The minute provides for payment of the "costs of conveying to jail," and the conviction for the "costs and charges of the said distress and of the conveying" to jail.

In my opinion it is unnecessary for the magistrate to insert the provision as to the costs of the distress and conveyance to jail in the minute. The statute fixes that and the magistrate had no discretion to adjudicate in regard to it, or power to deal with it. He need insert nothing, I think, which the law supplies as a consequence of the sentence.

The provision is properly set out in the conviction, and as its insertion in the minute was unnecessary the variance is immaterial. *Regina v. Hartley*, 20 Ont. R. 481; *Regina v. Richards*, 20 Ont. R. 514; *Regina v. Southwick*, 21 Ont. R. 670, are authorities to show that the conviction should not be quashed. In the last case, as here, it came up upon an appeal from the order refusing the writ.

The appeal should be dismissed, and with costs.

Appeal dismissed with costs.

Note: See the next case.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, J., GRAHAM, E.J., AND MEAGHER, J.

THE QUEEN V. VANTASSEL (No. 2).

Summary conviction—Pecuniary penalty—Imprisonment in default of distress—Costs of distress and conveying to gaol obligatory—Non-inclusion in conviction—Cr. Code sec. 872 (a)—Code forms WW and FFF.

1. If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction.
2. The omission of that provision from the formal conviction in such a case invalidates the conviction.

ARGUED: January 26, 1894.

DECIDED: March 19, 1894.

Appeal from a decision of Townshend, J., refusing an application for a writ of certiorari to bring up a conviction for selling intoxicating liquors contrary to the provisions of the Canada Temperance Act, one Denton being the prosecutor in the case.

The conviction provided for the imprisonment of defendant for the period of forty days, "unless the said sums" (the penalties and costs of conviction) "and the costs and charges of the said distress shall be sooner paid."

The minute of conviction, after providing for the forty days imprisonment, added, "unless the said sums shall be sooner paid."

The decision appealed from was in the same terms as that in *The Queen v. Vantassel* (No. 1), ante p. 128.

HALIFAX, January 26, 1894.

W. B. A. Ritchie, Q.C., in support of the appeal.

C. S. Harrington, Q.C., and *H. McInnes*, contra.

HALIFAX, March 19, 1894.

GRAHAM, E.J., delivered the judgment of the majority of the Court as follows :—

The question as to “expenses” which arose in Trask’s case [*R. v. Vantassel* (No. 1) ante], arose also here, but has been disposed of.

The conviction omits the provision as to the costs of conveyance to jail. This was the case in the *Queen v. McDonald*, 26 N.S.R. 94. Now, in that case, following *Ex parte Whalen*, 29 N.B.R. 146, I held it was discretionary with the magistrate to impose those costs, and that an adjudication requiring the detention of the defendant until such costs are paid need not be inserted in the conviction if not imposed. As is pointed out, the language of the Summary Conviction Act, R.S.C. ch. 178, sec. 66, held to be applicable, contained a provision that these costs should be imposed “if the justice thinks fit so to order.” These words are not in the Code so far as I can see. We have simply sec. 872.

I think the appeal should be allowed with costs, and an order issued for the writ.

MEAGHER, J., dissented.

Appeal allowed with costs.

Note : See the preceding case.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE SIR WILLIAM RALPH MEREDITH, C.J.C.P., MACMAHON AND
LOUNT, JJ., SITTING AS A DIVISIONAL COURT.

THE KING v. DUERING.

Locality of crime—Territorial jurisdiction of magistrate—Ontario Sheep Protection Act—Owning vicious dogs—Order for destruction—Order for damages—Separate information or complaint—Two penalties on one information—Quashing orders—Costs.

1. The offence under the Ontario Sheep Protection Act of possessing a dog which has worried sheep is committed in the district in which the owner of the dog resides and where the dog is ordinarily kept, notwithstanding that the sheep worrying may have taken place in another district.
2. A justice of the peace has no jurisdiction to try a charge in respect of such an offence alleged to have been committed in an incorporated town having a police magistrate of its own, except in the event of the latter's illness, absence or request (R.S.O. 1897 ch. 87, sec. 7).
3. A summary proceeding under that statute before a justice to recover damages for the killing of sheep by dogs is not ancillary to the proceedings under the same statute for the offence of possessing dogs which have killed sheep, and an order for such damages cannot be made on the trial of the complaint for possessing.
4. *Semble*, a justice of the peace may try a complaint under that statute for the recovery of damages if he has jurisdiction in the district in which the sheep were killed or injured.

ARGUED: November 14, 1901.

DECIDED: November 14, 1901.

The information or complaint of Abram Schott taken at the town of Berlin, in the county of Waterloo, on the 10th August, 1901, before J. A. Mackie, a justice of the peace for that county, charged that Henry B. Duering, of the town of Waterloo, in that county, within the space of one week last past, to wit, on the 4th August, 1901, at the township of Wellesley, in the same county, had in his possession two or more vicious dogs, and the said dogs did kill and destroy two sheep, the property of the deponent.

Upon this information, and evidence taken in the presence of the defendant before the above-named justice, the defendant was convicted, and, a writ of *certiorari* having been issued two convictions or orders were returned pursuant thereto.

One of these was as follows: "County of Waterloo. Be it remembered that Henry B. Duering having been on this day convicted before the undersigned, one of His Majesty's justices of the peace for the said county, on the oath of several creditable (*sic*) witnesses, for that the said Henry B. Duering, on the 4th day of August, 1901, at the town of Waterloo, in the said county of Waterloo aforesaid, did unlawfully have in his possession two dogs" (describing them) "which dogs worried and injured two sheep, the property of Abram Schott, at the township of Wellesley, in the county of Waterloo, on the said 4th day of August, 1901: I do, pursuant to the statute in that behalf, order that the said two dogs shall be killed by the said Henry B. Duering, within three days from his being served with a copy of this order." This order was dated the 26th August, 1901, at the town of Berlin, in the county of Waterloo, under the hand and seal of J. A. Mackie, J.P.

The other order was also under the hand and seal of J. A. Mackie, and bore the same date. It was as follows: "County of Waterloo. Be it remembered that on the 10th day of August, 1901, complaint was made before the undersigned . . . for that Henry B. Duering, of the town of Waterloo, in the county of Waterloo, owned or had in his possession two dogs and now owns or has in his possession such dogs, which within six months prior to the said date, to wit, on the 4th day of August, 1901, at the township of Wellesley, in the said county of Waterloo, worried, injured, killed, and destroyed two sheep, the property of Abram Schott, of the said township of Wellesley, and now at this day, to wit, on the 26th day of August, 1901, at the town of Berlin, in the said county of Waterloo, the said Henry B. Duering appeared before me . . .; and now, having heard the matter of the said complaint, I do adjudge the said Henry B. Duering to pay to the said Abram Schott the sum of \$10 on or before the 3rd day of September next, and also to pay to the said Abram Schott the sum of \$16.75 for his costs in this behalf; and if the said several sums be not paid on or before the said 3rd day of September, 1901, then I hereby order that the same be levied

by distress and sale of the goods and chattels of the said Henry B. Duering."

On the 7th October, 1901, *D. L. McCarthy*, for the defendants, obtained from MEREDITH, C.J.C.P., and LOUNT, J., sitting as a Divisional Court, a rule *nisi* to quash the two convictions or orders upon the following grounds:—(1) That the convictions or orders are invalid in that convictions or orders for distinct matters of complaint and involving separate and distinct consequences to the defendant are made upon one information or complaint and upon one hearing. (2) That the adjudication of the justice before whom the hearing took place was altered after the first conviction or order had been made, and different adjudications sought to be substituted therefor, without any notice to the defendant. (3) That no evidence was given on the said hearing of the amount of the damage caused to the complainant by the alleged killing of the sheep in question, nor do the orders made by the said justice for payment of a sum of money by the defendant to the complainant allege that such sum was the amount of such damage or was to be paid in compensation for such damage or that any damage was in fact sustained, and such orders are, therefore, invalid. (4) That the adjournment of the hearing by the justice for the convenience of the complainant on the 20th August, without fixing a day for resuming the hearing, rendered all further proceedings nugatory. (5) That the orders made by the justice for the killing of the dogs in question are invalid as shewing on their face that the alleged offence upon which the orders are based was committed in the town of Waterloo, and that the said orders were made by the said justice sitting at the town of Berlin, which towns are not within the jurisdiction of the said justice, there being a police magistrate for the said towns. (6) That the said justice had no jurisdiction to order payment by the defendant to the complainant of certain items included in the costs directed to be paid.

Affidavits were filed in support of and against the rule as to some of the grounds taken therein.

The following sections of R.S.O. 1897 ch. 271, an Act for the Protection of Sheep and to impose a Tax on Dogs, may be referred to:—

11. On complaint made in writing on oath before a justice of the peace for any city, town or county, that any person residing in such city, town or county, owns or has in his possession a dog which has within six months previous worried or injured or destroyed any sheep or lamb, the justice of the peace may issue his summons, directed to such person, stating shortly the matter of the complaint, and requiring such person to appear before him, at a certain time and place therein stated, to answer to such complaint, and to be further dealt with according to law.

12. The proceedings on the complaint and summons shall be regulated by the Ontario Summary Convictions Act, which shall apply to cases under this Act.

13. In case any person is convicted, on the oath of a credible witness, of owning or having in his possession a dog which has worried or injured or destroyed any sheep or lamb, the justice of the peace may make an order for the killing of such dog (describing the same according to the tenor of the description given in the complaint and in the evidence) within three days, and in default thereof may in his discretion impose a fine upon such person, not exceeding \$20 with costs; and all penalties imposed under this section shall be applied to the use of the municipality in which the defendant resides.

14. No conviction under this Act shall be a bar to any action by the owner or possessor, as aforesaid, of any sheep or lamb for the recovery of damages for the injury done to such sheep or lamb, in respect of which such conviction is had.

15.—(1) The owner of any sheep or lamb killed or injured by any dog shall be entitled to recover the damage occasioned thereby from the owner or keeper of such dog, by an action for damages or by summary proceedings before a justice of the peace, on information or complaint before such justice, who is hereby authorized to hear and determine such complaint, and proceed thereon in the manner provided by the Ontario Summary

Convictions Act in respect to proceedings therein mentioned; and such aggrieved party shall be entitled so to recover in such action or proceedings, whether the owner or keeper of such dog knew or did not know that it was vicious or accustomed to worry sheep.

—(6) Appeals against any conviction, apportionment or order made by a justice of the peace under this section, shall be made to the Division Court . . .

TORONTO, November 14, 1901.

J. C. Haight, for the defendant, supported the rule. The information appears to be under sec. 15. There cannot be an adjudication for two offences upon one information: sec. 845, sub-sec. 3, of the Criminal Code. It is not suggested anywhere that these dogs ever killed or worried sheep before. The allegation of owning and killing on the same day does not shew the possession after the killing: *Hamilton v. Walker* (1892), 61 L.J.N.S.M.C. 134. The magistrate had no jurisdiction over an offence committed in the town of Waterloo, a police magistrate having been appointed for the towns of Berlin and Waterloo: see *The Ontario Gazette*, 14th October, 1899. By R.S.O. 1897 ch. 87, sec. 7, the jurisdiction of a justice of the peace is excluded where there is a police magistrate, except in the cases of illness, absence, or request, none of which is shewn here. See also the Interpretation Act, R.S.O. 1897 ch. 1, sec. 8, sub-sec. 22. The magistrate sat at Berlin; he could not adjudicate there upon an offence committed in Waterloo, even if he had jurisdiction in himself: *Regina v. Roe* (1888), 16 O.R. 1. There was no evidence of damages sustained by the complainant. The offence under secs. 11 to 13 and the offence under sec. 15 are quite distinct; the enactments were originally contained in different statutes.

William Davidson, for the complainant: The information charges the offence of owning as committed in the township of Wellesley. The damages under sec. 15 follow upon the conviction under sec. 13.

MEREDITH, C.J. (at the close of the argument):—We think that the objection taken by Mr. Haight that the magistrate who assumed to try these complaints had no jurisdiction to do so is well taken. There was a police magistrate for the town of Waterloo, and that being so, the jurisdiction of the ordinary county magistrate to adjudicate as to an offence committed within the town was taken away, unless a case had been made, which does not appear from these proceedings, that the magistrate was acting for or at the request of the police magistrate, or in circumstances in which it is provided that a justice may act.

Here it appears upon the face of the proceedings, I think, that the offence which was charged, which is the having in possession a dog which has within six months done the act which the 11th section mentions, was committed at the town of Waterloo, where the defendant resided, as is shewn by the conviction.

The mistake of the magistrate, no doubt, arose from his erroneously assuming that the offence was committed at the place where the sheep had been worried, injured, or destroyed, which is stated to have been in the township of Wellesley; but that is not the offence, as I have already said. The offence is the having in possession a dog which, wherever the act has been done, has worried, injured, or destroyed sheep within the six months. So that it is clear, I think, that the magistrate had no jurisdiction to entertain the complaint under sec. 11 of the Act.

With regard to the other matter, the order purporting to be made under sec. 15, I think it is clear that that is not a proceeding ancillary to the trial and determination of the complaint under sec. 11. Under sec. 11, the inquiry is complete when the magistrate has adjudicated as to whether or not the person complained of has done the act mentioned in sec. 11, and has, if he convicts, imposed the penalty which he is authorized by sec. 13 to impose, that is to say, made the order for the killing of the dog within three days, and in default,—

whatever that may mean,—imposed the fine not exceeding \$20 and costs, if he decides to impose it.

The proceeding under sec. 15 is, by the very terms of the section, one to be taken upon an information or complaint to the justice for the recovery of damages for which the owner of a dog which has killed or injured sheep is liable to the owner of the sheep.

When one considers where that section came from and the purpose of the law, it is manifest, I think, that Mr. Davidson's contention cannot prevail. At common law it was necessary to prove scienter, and the only remedy was by an action in the ordinary course. The purpose of this section was to do away with the necessity of proving scienter, and to enable the person injured, at his election, to proceed either by action or by summary proceeding before a justice. It formed part, as Mr. Haight has pointed out, of an entirely different statute, and the mere fact that the two provisions are brought together in this way, although it might at first sight lead one to suppose that one was a sequence of the other, really does not properly lead to that conclusion.

The inquiry under sec. 11 was completed, and there was no power under that section and in a proceeding under it to enter upon the inquiry as to damages which had been committed.

There is the further objection that the complaint when laid was not under this section, but was properly made under sec. 11, and the person making it did not ask the magistrate to enter upon the inquiry as to the damages under sec. 15.

I do not know how far the objection which we have determined against the respondent upon the question of jurisdiction is applicable under sec. 15. Possibly, different considerations might have applied if proceedings had been taken under sec. 15, for the act for which the liability arises is the killing or injuring of the sheep, and that took place in the township of Wellesley.

The result is, that we must come to the conclusion that neither the order nor the conviction can stand, and that both must be quashed.

With regard to the costs, we think that as to the motion to quash the conviction which was followed by the order for the destruction of the dog, there should be no costs. The evidence disclosed that an offence had been committed under sec. 11, and the question of the want of jurisdiction was not raised, and the assuming jurisdiction was the mistake of the magistrate. We think that we may fairly, in these circumstances, exercise our discretion as to costs by not imposing the costs upon the respondent, although he has failed. These considerations do not apply to the other appeal, because he insisted upon going on with the claim for damages which we have held the magistrate had no jurisdiction to entertain,—not merely a want of jurisdiction by reason of the locality, but for the other reasons already mentioned—and the costs incident to the quashing of that conviction or order the respondent must therefore pay.

MACMAHON and LOUNT, JJ., concurred.

Conviction and order both quashed.

[COUNTY COURT OF YARMOUTH, NOVA SCOTIA.]

BEFORE HIS HONOR ALFRED W. SAVARY, COUNTY JUDGE.

THE KING v. TOWNSEND.

THE KING v. MURTAGH.

Protection of game—Fishing in Canada by foreigners—"Temporarily domiciled"
—Appeal—Fisheries Act, R.S.C. 1886 ch. 95—Crim. Code sec. 879.

1. An appeal lies under Code sec. 879 from a conviction made under the Fisheries Act, R.S.C. ch. 95, sec. 18, notwithstanding the special appeal provided by that Act.
2. The special appeal, which under the Fisheries Act may be made to the Minister of Marine and Fisheries, may be taken after the disposal of an appeal to a County Court.
3. A foreigner coming to Canada for successive seasons on fishing trips and occupying for a few weeks only in each year a building he has erected for use as a fishing camp is not a person "temporarily domiciled" in Canada under the Fisheries Act and the Order in Council passed in pursuance thereof.

DECIDED: October 17, 1901.

These cases came before a stipendiary magistrate on the complaint of a fishery overseer, the conviction in each case being that the defendant had violated certain regulations made under sec. 18 of the Fisheries Act, respecting fishing by foreign sportsmen in the inland waters of Canada.

The evidence on which it was contended that the defendants were "temporarily domiciled" in Canada was as follows:—"I have been here two or three trips fishing. I came here trout fishing and for that express purpose. We are owners of a camp near Kempt, which I suppose is on Crown land. It is simply a fishing camp; it contains three rooms and attic, in which we live; it is a regular shingled house, built for the express purpose of residing in during these trips. After each trip we usually make arrangements for the next trip; we leave all our traps in the camp; a good deal of clothing and fishing material, which remain there till we return next season."

The defendants were found guilty by the stipendiary magistrate of fishing without having procured the necessary permit

for that purpose. They appealed to the Judge of the County Court for District No. 3.

Pelton, K.C., for the Crown.

Harrington, K.C., and *George Bingay*, K.C., for defendants.

YARMOUTH, N.S., October 17, 1901.

SAVARY, Co. J.:—There is an appeal to this Court from these convictions, as from other summary convictions. The appeal to the Minister of Marine and Fisheries given by the Act, ch. 95, Revised Statutes of Canada, sec. 18, sub-sec. 6, does not take away the general right of appeal to this Court under the Crim. Code sec. 879. My duty is to decide whether these parties were properly convicted. If my decision should be against them, they can still appeal to the Minister and procure the remission of the penalties if he thinks the enforcement of the law a hardship in the particular case.

These regulations under sec. 18 of the Fisheries Act are, first, an Order in Council of June 30th, 1894, of which the object is stated to be "the more efficient protection of game, fish and the prevention of abuse by foreigners angling in the inland waters of the Dominion," and it proceeds to ordain that no person other than a British subject shall angle for, fish for and take (besides other fish specified) trout in Canadian waters without having first obtained an angler's permit issued by the local fishery officer in each district under the authority of the Minister of Marine and Fisheries; and that each person not a British subject shall pay for such angler's license a fee of \$5 for a period of three months, or \$10 for a period of six months. On the first day of the following August a further Order in Council was passed, with a preamble stating that it was deemed advisable to amend the regulations of June 30th, so as to exempt under certain conditions foreigners domiciled in Canada from the regulations requiring permits, and proceeding to ordain as follows: "Foreigners when temporarily domiciled in Canada and employing Canadian boats and boatmen shall be exempted from the regulations requiring permits."

The argument was on the meaning of the words "temporarily domiciled," and counsel on both sides seemed to agree that this was a self-contradictory phrase; an inartistic and inconsistent term, hardly capable of a sensible construction.

On full consideration I must say I cannot altogether concur in this view, but on the contrary it may be that no other language could be found which would more adequately express the intention of the enacting authority. Foreigners "visiting Canada," or "temporarily residing" in Canada might have included some whom it was the policy of the law to exclude from the privilege of fishing in our waters freely, and on the same terms as our own people. It was laid down by an old authority that "the word 'domicil' has many meanings, according as it is used with reference to succession and other purposes. A person may have retained a foreign domicil for many purposes, and yet may be domiciled in England so as to give jurisdiction for divorce": Fisher's Digest, p. 3187. So in the case of regulations under the Fisheries Act the word may be used in a sense not strictly technical, but one which renders the adjectives "temporary" and "permanent" by no means inconsistent or inapplicable. It may, for instance, mean living in the country for a limited period under such conditions as would give the foreigner a domicil here for all purposes, if such residence were, or were intended to be, permanent. In the case of *Le Mesurier v. Le Mesurier*, [1895] App. Cas. 517, Lord Watson (at p. 540) speaks of the domicil "for the time being" of a married pair, and in another place quotes from Lord Westbury in *Gould v. Gould*, L.R. 3 H.L. 85, the expression "permanent domicil," shewing that these terms are not so very anomalous or self-contradictory, but that the expression "temporarily domiciled" must be construed and given effect to under the ordinary rules governing the construction of statutes, and with a view to the object and policy of the Legislature. In *King v. Foxwell*, L.R. 3 Ch. D., p. 318, Jessel, M.R., asks himself the question, "What is domicil?" and answers in effect that "a man in order to change his 'domicil of origin' must choose a new domicil by fixing his sole or principal residence in a new

country with the intention of residing there for a period not limited as to time."

This is quite in accord with the definition of the term "domicil" given in Wharton and Bouvier's law dictionaries, and, therefore, surely in order to decide whether a party is "temporarily domiciled" in Canada it is only necessary to enquire whether he has fixed his "sole or principal residence" in the country for a period limited as to time. I do not see how I can hold that these parties had either their "sole" residence or their "principal" residence in Canada during the time they were here merely for the purpose of enjoying a few weeks' fishing, even although they may have erected a building at more or less expense, not as a home, but for additional convenience and comfort in the prosecution of their sport. They were not owners or tenants of houses here, occupying them with their families for the summer months, as quite a number of their countrymen do, nor guests at any of our hotels, as so many with families are, as well as many single men without families, but according to the case laid before me, they come here every year expressly and solely for the purpose of sport, and leave as soon as it is over.

Let us suppose some point on the frontier, where it takes but an hour or so to cross the boundary line and reach a stream or lake on the Canadian side, and two American gentlemen come over for the purpose of fishing, both employing Canadian boats and boatmen, but one of them having his tent erected on the American and the other on the Canadian side of the line. I cannot see in the obvious policy of the regulations any reason why the last mentioned should be allowed to fish without a permit, while the other is prohibited. The enacting authority could never have intended to attach the idea of domicil to a building intended and adapted merely to facilitate and render more comfortable the fishing operations of a party, who comes here for no other purpose than to fish, whether such an erection cost \$5 or \$500.

I am not called on to say what conditions of residence by a foreigner would constitute a temporary domicil under these

regulations. It is sufficient for the purpose of this case to say that those disclosed in the evidence and in the case stated do not. It is not my duty to enquire whether, in view of the restrictions, if any, placed on Canadian sportsmen using American waters, the regulations before me are or are not unduly restrictive or inhospitable; nor am I sportsman enough to know whether these regulations are more or less exacting, in proportion to the privileges bestowed, than the provincial legislation, which requires a license fee of \$30 from any one not domiciled in Nova Scotia to hunt moose in the province. Nor am I called on to say whether a foreigner actually domiciled here is shut out by these regulations, and therefore in a worse position than a mere visitor, as suggested. It will be time enough to decide that when the occasion requires it.

I find that (1) The defendants under the amended Order in Council of August 1, 1894, were not exempt from the previous regulations requiring permits. (2) The defendants were not temporarily domiciled in Canada within the meaning of the amended order. (3) The defendants were guilty of violating the Fisheries Act. (4) The defendants were properly convicted. The convictions will, therefore, be confirmed and the appeals dismissed with costs.

Appeals dismissed.

[COUNTY COURT OF WESTMINSTER, B.C.]

BEFORE HIS HONOUR W. NORMAN BOLE, COUNTY JUDGE.

THE KING v. MICHAEL GEE.

*Agency—Illegal sale of liquor to Indian—Sale by "clerk, servant or agent"—
Ejusdem generis—Hotel servant unauthorized to make sales—Indian Act,
R.S.C. 1886 ch. 43, sec. 94—51 Vict. (Can.) ch. 22, sec. 4.*

1. An illegal sale of liquor to an Indian by a hotel cook or other employee unauthorized by the proprietor to sell liquors is not, in the absence of any knowledge or connivance on the part of the proprietor, a sale "by his clerk, servant or agent" so as to render the proprietor liable to the penalty imposed by the Indian Act, R.S.C. 1886 ch. 43, sec. 94, as amended by 51 Vict. ch. 22, sec. 4.

NEW WESTMINSTER, December 21, 1901.

This is an appeal from a conviction made by Captain Pittendrigh, S.M., under the Indian Act, for supplying liquor to Indians at Blaine, B.C., on the 14th day of September, 1901. the fine imposed being \$100 and costs.

The Indian Act, sec. 94, as amended in 1888 (51 Vict. ch. 22, sec. 4), provides "Every one who, by himself, his clerk, servant, or agent, and every one who in the employment or on the premises of another directly or indirectly on any pretence or by any device sells, barter, supplies, or gives to any Indian or non-treaty Indian any intoxicant or causes or procures the same to be done, or attempts the same or connives thereat," is guilty of an offence, the punishment for which is provided for by the latter part of the section.

The facts of the case are shortly these :—Constable Calbick, an active and intelligent provincial police officer, very properly endeavouring to suppress the sale of liquor to Indians, sent two Indians on the day in question to St. Leonard Hotel, Blaine, B.C., to buy whisky. I have no doubt they did buy the liquor as described on the outside of the hotel from some one in the employ of defendant, so the only question of practical importance left me to decide is—was the person who made that unlawful sale an employee of the appellant for whose act the

employer in the absence of proof of agency is liable within the meaning of the Indian Act. If he were, *cadit quæstio* and the conviction must be affirmed—if he were not, it must be quashed.

Agency has been defined in the case of *Pole v. Leask*, 33 L.J. Ch. 155 (H.L.) per Lord Cranworth, thus:—"As to the constitution by principal of another to act as his agent. No one can become the agent of any person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only by will of the employer that an agency can be created. Another proposition to be kept constantly in view is that the burden of proof is on the person dealing with anyone as an agent through whom he seeks to charge another as principal. He must shew that the agency did exist and that the agent had the authority he assumed to exercise or otherwise that the principal is estopped from disputing it."

Now the words of the Act, "clerk, servant or agent," cannot, I think, be held to include servants of every description such as cooks, messengers, etc., I cannot for a moment think that the Legislature intended to make a man personally responsible for the severe penalties imposed by the Indian Act if his coachman or groom of his own motion and without any knowledge or connivance on the part of his employer gave liquor to an Indian.

A long list of cases from the well-known *Sandeman v. Beach*, 7 B. & C. 100, down to *Hunt v. G. N. Ry. Co.*, [1891] 1 Q.B. 601, would go, in my opinion, to shew that such is not the true meaning of the section.

This rule of law, generally known as the *ejusdem generis* rule, was laid down by Lord Campbell in *R. v. Edmundson* (1859), 28 L.J.M.C. at p. 215, thus: "I accede to the principle laid down in all the cases cited that where there are general

words following particular and specific words the general words must be confined to things of the same kind as those specified."

The evidence seems to indicate that the person who sold the liquor was cook in the hotel and there is no suggestion of any connivance on the part of the appellant who, it was stated, was ill in bed at the time of the sale.

Under these circumstances I do not think the conviction can be sustained. The appeal will be allowed without costs.

Appeal allowed.

Aulay Morrison, K.C., for appellant.

Corbould, K.C., for respondent.

Note: *Clerk, servant or agent—Interpretation of statute.*

See *R. v. Tessier* (1900), 5 Can. Cr. Cas. 73 (Que.), and Note ante p. 80.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., RITCHIE, TOWNSHEND AND MEAGHER, JJ.

THE QUEEN V. LEARMENT.

Liquor License law—Unlicensed hotel—Lease of bar—Collusive arrangement to defeat statute—License inspector—Statutory exemption from liability to pay costs—Inspector's costs of opposing unsuccessful appeal refused—Liquor License Act (N.S.) 1895 ch. 2.

1. An hotel proprietor is properly convicted as a principal for the offence of selling intoxicating liquors without a license, notwithstanding that the sale was made under cover of a lease of the bar-room made by him to another party, if such lease be found to be a collusive arrangement to enable the lessor to obtain the profits and advantages of the illegal sale of liquor therein without a license.
2. On a prosecution under a Liquor License Act by a license inspector and an appeal by the defendant from the conviction obtained, costs will not be awarded to the inspector on the dismissal of the appeal, if by statute he is exempt from liability to pay costs had the decision been against him.

ARGUED: November 18, 1898.

DECIDED: November 18 and 19, 1898.

Appeal from the judgment of Chipman, C.C.J., affirming a conviction of defendant for selling intoxicating liquors contrary to the provisions of the Nova Scotia Liquor License Act, 1895, in his hotel, known as the Learment House at Truro. The sale was admitted. The defence relied upon was that defendant was not the proprietor of the whole hotel, nor of the room known as the bar-room of the hotel, the same having been leased, on the 17th February, 1895, to one Samuel Harris of Montreal. Defendant's evidence shewed that Harris, the alleged lessee, was not a resident of Nova Scotia; that the only public entrance to the bar was through the main office of the hotel; that the person employed as bar-keeper got his meals at the hotel, and had paid nothing for his board; that defendant's bookkeeper took charge of the cash receipts of the bar and paid them into the bank to defendant's credit; that defendant had never asked Harris for rent, and had never paid him any part of the receipts; that money had been used out of the receipts to buy stock; that fines, and all cheques in connection with disburse-

ments for the bar were signed by defendant; that there had been no settlement with Harris since the lease was drawn; that the taxes had not been transferred to Harris on the books of the town; and that defendant sometimes had a key of the private door used for the purpose of taking stock into the bar.

HALIFAX, November 18, 1898.

H. A. Lovett and *W. McDonald* in support of appeal: It is proved that Learment had no interest in the business carried on in the bar, and there is no evidence that this property was demised for an illegal purpose. It is not true that the conviction should not be quashed unless clearly wrong, and there is no evidence to sustain it: N. S. Acts 1895 ch. 2, sec. 118, sub-secs. 3 and 9. The judge on the appeal must dispose of it on the merits, and unless it is shewn that there is no reasonable doubt as to the guilt of the accused, the conviction must be quashed. [McDONALD, C.J.;—Under sec. 119, this matter comes up to us like any other appeal from the County Court. All we have to do is to look at the evidence and give the judgment which should have been given below.] Upon the judge's own statement, he has never tried and determined the charge as provided by the statute. *Taylor v. Gavin*, 18 N.S.R. 335. The word "premises," as used in the statute, does not mean that only the whole building can be licensed. There is nothing in the Act to prevent the proprietor of an unlicensed hotel from obtaining a shop license for certain rooms in the building. N. S. Acts 1895 ch. 2, sec. 5, sub-secs. *a* and *b*; N. S. Acts 1896 ch. 25, sec. 1. There is no evidence that the sale was without license. Section 130 would only apply to a case in which the defendant was an occupant of the premises. Even if Learment had known that the premises were to be used for an illegal purpose, that is not sufficient, in itself, to make the lease void as against public policy: *Clark v. Hagar*, 22 S.C.C. 510; *Waugh v. Morris*, L.R. 8 Q.B. 202; *Smith v. Burton*, 20 Ont. R. 344. Whether the lease was void as against public policy or not, the contract having been executed, the term became vested

in the lessee: *Scarfe v. Morgan*, 4 M. & W. 270; *Hagar v. Neil*, 20 Ont. App. 198; *Roberts v. Roberts*, 2 B. & Ald. 367; *Myerst v. Jenkins*, L.R. 16 Eq. 275. In order for the prosecution to succeed they must shew that Learment sold the liquor himself, or by his clerks or servants, or by some person authorized by him to sell: N. S. Acts 1895 ch. 2, sec. 128. This section is only applicable to the occupant of the room where the liquor is sold. There is no penalty for simply permitting a sale: *Commonwealth v. Wentworth*, 146 Mass. 36.

S. D. McLellan, contra, was stopped by the Court.

HALIFAX, November 18, 1898.

MCDONALD, C.J.:—After reading the evidence we have come to the conclusion that the transaction between Learment and Harris was simply a collusive arrangement to enable Learment to sell liquor without a license. Some of the Court think that the fact that he did not deny that he was a party to the sale is strong evidence of collusion.

As to costs; if the inspector, under the statute, is not liable for costs, he should not be allowed costs.

On the following day,

F. T. Congdon moved the rule dismissing the appeal with costs. Acts of 1890, ch. 18, sec. 10, has been repealed, and does not appear in the Act of 1895. *The Queen v. King*, 25 N.S.R. 488; *The Queen v. Grant*, 30 N.S.R. 368. Costs were allowed against the prosecutor, who, as a matter of fact, was the inspector, although it does not so appear in the report. In *The Queen v. Stevens*, 31 N.S.R. 124, costs were allowed to the inspector. N. S. Acts 1895 ch. 2, sec. 118, sub-secs. 3 and 4. Costs may be awarded against the inspector. The exception in sub-sec. 3 refers only to sec. 118, sub-sec. 10.

H. A. Lovett, contra: N. S. Acts 1895 sec. 70, sub-sec. 1; N. S. Acts 1895 ch. 2, sec. 140. In *The Queen v. Stevens*, the question of costs was not raised in this respect at all. The

effect of the amendment is to leave the question of costs just as it was before.

F. T. Congdon, in reply.

RITCHIE, J.:—The rule will go without costs.

Appeal dismissed without costs.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE WALKEM, J.

THE KING v. GEISER.

Case stated—Recognizance imperative—Cash deposit not good—Alien Labour Act, 60-61 Vict. (Can.), ch. 11—Criminal Code sec. 900 (4).

1. A cash deposit cannot be accepted in lieu of a recognizance on an appeal by way of "stated case" from a summary conviction.
2. The recognizance required by Code sec. 900 is a condition precedent to the jurisdiction of the Court to hear the appeal.

ARGUED : October 14, 1901.

DECIDED : October 15, 1901.

Appeal by way of case stated under section 900 of the Criminal Code.

ROSSLAND, B.C., October 14, 1901.

MacNeill, K.C., and *W. S. Deacon*, for the prosecution, objected that the Court had no jurisdiction as no recognizance had been entered into.

Daly, K.C., contra.

ROSSLAND, B.C., October 15, 1901.

WALKEM, J.:—This appeal comes up before me in the form of a case stated by the police magistrate of Rossland.

The charge against Geiser is that, in contravention of sec. 1 of an Act to Restrict the Importation and Employment of Aliens (60-61 Vict., Can. ch. 11), he did, on the 21st day of August last, "assist and encourage the importation or immigration into Canada of Neal Stevenson, an alien, under contract made previous to the importation or immigration of said Neal Stevenson, to perform labour in Canada, contrary to the form of the statute in such case made and provided."

Mr. MacNeill objects to the appeal being heard on the ground that the requirements of sub-sec. 4 of sec. 900 of the Code, and of Crown Rules 59 and 60, have not been complied with. The Crown Rules, I may state, are copies of the English Rules. The combined effect of the section and rules is that every case stated shall be applied for within four days from the date of the order complained of, and that at the time of making the application, and before the delivery of the case, the appellant shall "in every instance" enter into a recognizance to the extent of \$100 conditioned to prosecute his appeal without delay and submit to the judgment of the Court.

The unusual words, "in every instance," would appear to have been purposely used by the Legislature to emphasize its intention that no other security than a recognizance should be offered or accepted. In the present instance, the application for the case stated was properly made; but instead of a recognizance being entered into by the appellant, he deposited a marked cheque for \$100 with the magistrate. As this was, obviously, not a compliance with the requirements of the statute, I must dismiss the appeal with costs, as the observance of that requirement was a condition precedent to the right to appeal.

This is in accordance with the unanimous opinion expressed by the Court of Appeal in *Lockhart v. The Mayor, Aldermen and Citizens of St. Albans* (1888), 21 Q.B.D. 188 (C.A.), in reference to a similar enactment and similar rules. This opinion, I am bound to follow: see *Trimble v. Hill* (1879), 5 App. Cas. 344.

Appeal quashed.

Note: Stated case—Conditions precedent—Cr. Code sec. 900 (4).

The English Summary Jurisdiction Act of 1879, giving a right of appeal by way of stated case, provided that "the application shall be made and the case stated within such time and in such manner as may be from time to time directed by rules under this Act:" 42 & 43 Vict., ch. 49, sec. 33. The rule made under it (S. J. Rules, 1886, No. 18) directed that "an application to a court of summary jurisdiction, under sec. 33 of the Summary Jurisdiction Act, 1879; to state a special case shall be made in writing, and a copy left with the clerk of the court." It was held by Lord Coleridge, C.J., and Denman, J., that where an oral application had been made to the justices at the hearing and granted by them, and afterwards a notice was served on the clerk, the justices had no power to state the special case, and the preliminary objection to its being heard was allowed: *South Staffordshire Waterworks v. Stone* (1887), L.R. 19 Q.B.D. 168.

This decision was approved and followed in *Lockhart v. Mayor of St. Albans* (1888), 21 Q.B.D. 188, in which no notice had been given to the magistrates themselves, although notice had been served on the magistrate's clerk. The Court of Appeal (Lord Esher, M.R., Lindley, and Lopes, L.JJ.) held that compliance with the provisions of the rule was a condition precedent to the right of appeal, and that there had been a failure to comply with it, which barred the appeal.

Trimble v. Hill (1879), 5 App. Cas. 342, decides that where a colonial legislature has passed an Act in the same terms as an Imperial statute, and the latter has been authoritatively construed by a Court of Appeal in England, such construction should be adopted by the courts of the colony. See also, on the latter point, *Paradis v. The Queen*, 1 Can. Exch. R. 191; *Holender v. Ffoulkes*, 26 Ont. R. 61; *Butler v. McMicken*, 32 Ont. R. 422.

[SUPREME COURT OF NOVA SCOTIA].

BEFORE TOWNSHEND, J., GRAHAM, E.J., AND MEAGHER, J.

THE KING v. GIOVANETTI.

Stipendiary magistrate—Appointment—Territorial jurisdiction—"Whole of the county"—When incorporated town included—Concurrent jurisdiction with stipendiary for town—Canada Temperance Act—R.S.N.S. ch. 33.

1. Where a statute declares that the jurisdiction of a county stipendiary magistrate shall extend throughout the "whole of the county," it is to be construed as including jurisdiction in any incorporated town within the county limits notwithstanding the fact that there is a stipendiary magistrate for such town alone, unless the latter's jurisdiction is made exclusive.

ARGUED : November 19, 1901.

DECIDED : December 28, 1901.

Appeal on notice by the prosecutor from the judgment and order of MacDonald, C.J., made in Chambers, on a contested motion, allowing a writ of certiorari to remove into the Supreme Court a certain record of conviction made on or about the 3rd day of April A.D. 1901, by John C. Townsend as stipendiary magistrate in and for the County of Cape Breton, whereby the said Anthony Giovanetti at the suit of His Majesty the King, on the prosecution of Duncan R. Cummings was convicted as for a first offence of having on the 3rd day of February A.D. 1901, on his premises in the town of Sydney in the County of Cape Breton, unlawfully kept intoxicating liquors for sale contrary to the provisions of the second part of the Canada Temperance Act.

The ground taken was that the said magistrate, John C. Townsend, had no jurisdiction as such stipendiary magistrate to make convictions for offences committed in the town of Sydney. The facts bearing on this point are referred to in the judgment of Townshend, J.

HALIFAX, November 19, 1901.

C. P. Fullerton, for the appellant.

No one contra.

HALIFAX, December 28, 1901.

The judgment of the Court was delivered by

TOWNSHEND, J.—

The only point argued on this appeal was that the stipendiary magistrate who made the conviction had no jurisdiction. It appears from the affidavits that the offence for which the defendant was convicted was committed in the town of Sydney, an incorporated town in the County of Cape Breton. The stipendiary's commission is for the County of Cape Breton, and it is contended that this gives him no jurisdiction to try offences committed in the town. It does not appear that the stipendiary for the town has exclusive jurisdiction over offences within its limits.

Chapter 33 R.S.N.S. contains the law relating to the appointment and authority of stipendiary magistrates. The appointment is to be made by the Governor in Council, (1) for every incorporated town, (2) one or more for each county. Section 4 provides as follows:—"If more stipendiary magistrates than one are appointed for any county, the town, village, settlement, or locality in which each of said stipendiary magistrates is required to reside shall be declared by the Order in Council making the appointment or by a subsequent order as to the Governor in Council seems meet, but every stipendiary magistrate shall have jurisdiction, power and authority throughout the *whole of the county* for which he is appointed and such larger area as is prescribed by any special law."

Now it seems to me that the legislature in using the words "*the whole county*" meant to place beyond controversy the very point now raised, otherwise incorporated towns would

have been excepted from "the whole county." In ordinary parlance "the whole county" would certainly mean each and every part of it, and unless the context requires a different construction we might interpret the language in this way. Section 14 is relied on as indicating such is not the intention. I do not think it presents any such difficulty. This was evidently passed to make it clear that in cases where an exclusive jurisdiction has been conferred on stipendiaries in some towns, that notwithstanding, stipendiary magistrates for the county might hold their Courts there to try cases arising elsewhere. There are certain towns in the province with this exclusive jurisdiction, hence the necessity.

I am for this reason of opinion that this appeal should be allowed, and the order below reversed with costs and the costs of this appeal.

GRAHAM, E.J., and MEAGHER, J., concurred.

Appeal allowed with costs.

[COUNTY COURT OF WESTMINSTER, B.C.]

BEFORE HIS HONOUR W. NORMAN BOLE, COUNTY JUDGE.

THE KING v. JACK.

Appeal from summary conviction—Notice of appeal—Address of same—Service on convicting justice—Cr. Code sec. 380 (b)—Code form NNN.

1. A notice of appeal from a summary conviction served upon the convicting justices is not invalid because it is not addressed to them by name.
Cragg v. Lamarsh (1898), 4 Can. Cr. Cas. 246, not followed.

DECIDED: January 11, 1902.

The appeal herein was taken from the conviction of appellant before two magistrates for selling liquor to an Indian contrary to the Indian Act. Appellant was fined \$100, or, in default, two months imprisonment.

Mr. Bowser, K.C., raised an objection to the notice of appeal, which, although duly served upon the convicting justices, was not addressed to them by name, and he relied on *Cragg v. Lamarsh* (1898), 4 Can. Cr. Cas. 246, in support of his contention.

Mr. McQuarrie, for appellant, relied on *Reg. v. Justices of Essex*, [1892] 1 Q.B. 490.

CHILLIWHACK, B.C., January 11, 1902.

BOLE, CO.J.:—I overrule the objection, being of opinion that as section 982 of the Code provides that the forms given or forms to the like effect are sufficient, there was a substantial compliance with the statutory form of notice, and I desire to adopt the reasoning of Mr. Justice Scott in *Cragg v. Lamarsh*, supra; *Burtlett v. Gibbs*, 5 M. & G. 81. *Mountcashel v. O'Neill*, 5 H.L.C. 937, cited by the Chancellor in *Gemmell v. Garland*, 12 O.R. 139, and *Ex parte Stanford*, 17 Q.B.D. 259 (C.A.), may also be referred to.

The next point for consideration is whether Samson, the Indian informant, was a credible witness within the meaning of the Indian Act? It appears to me that although Samson did not enjoy the confidence of all his white neighbours, still the circumstances of the case and the fact that his story was corroborated in several most important particulars by witnesses of unimpeachable veracity, warranted me in adopting the same view of the matter as that taken by the Court below. To my mind, the case was clearly proved. I must, therefore, confirm the conviction and dismiss the appeal with costs.

*Preliminary objection overruled,
but conviction affirmed.*

Note: *Appeal from summary conviction—Form of notice of appeal—Service on justices for respondent—Cr. Code sec. 880—Code form NNN.*

The correctness of the above decision is to be doubted. It was held by Bélanger, J., of the Quebec Court of Queen's Bench, in *Canadian Society v. Lauzon* (1899), 4 Can. Cr. Cas. 354, that where a notice of appeal under the Summary Convictions clauses is served on the justice who tried the case, instead of on the respondent himself, such notice must shew on its face that it is so served on the justice for the respondent. The notice in that case had been directed to the justices alone, and did not specify on its face that it was intended for the respondent. The wording of sub-sec. (b) of Code sec. 880 is as follows:—"The appellant shall give to the respondent, or to the justice who tried the case, for him, a notice in writing in the form NNN. in schedule 1 to this Act, of such appeal within ten days after such conviction or order." Form NNN. begins as follows:—"To C. D., of , and , (the names and additions of the parties to whom the notice of appeal is required to be given)." In *Cragg v. Lamarsh* (1898), 4 Can. Cr. Cas. 246, referred to supra, the notice of appeal was not addressed to any person. The Supreme Court of the North-West Territories held (and it is submitted that their decision was correct) that the notice was invalid; per Richardson, Rouleau, and Wetmore, JJ. (Scott, J., dissenting). A former decision of the same Court, *Keohan v. Cook*, 1 N.W.T. Rep., No. 1, p. 54, is to same effect.

In *Ex parte Doherty*, 25 N.B.R. 38, the notice of appeal served on the justice was merely addressed to the justice, and not to the complainant or to the justice for the complainant, and it was held sufficient. The decision in *R. v. Jack*, supra, goes further, and holds that the notice is sufficient although not addressed at all, and it is therefore directly contrary both to the decisions before mentioned in the Territories and to the case of *Canadian*

Note—(Continued).

Society v. Lawson. The latter will probably not be generally followed, as it places an extreme construction on sub-section (b) which would make it equivalent to an enactment that the appellant should leave the written notice with the respondent or with the justice for delivery to him.

As the statute authorizes the giving of notice of appeal to the justice, it seems reasonable to suppose that the notice may be addressed to such justice and to him only, and that the words "for him," which follow, are intended to convey that such notice shall be good and sufficient notice to the respondent, who must necessarily become acquainted with the fact when the enforcement of the justice's decision is sought by him. There being no provision requiring the justice to deliver the notice to the respondent on demand or otherwise, it is submitted that the notice of appeal when served upon the justice becomes part of the record of the proceedings taken before him, and should be transmitted by him to the appellate court.

Where a notice is served personally upon the person required to be notified, a written direction or address is not usually necessary: *Doe v. Wrightman*, 4 Esp. 5; but Form NNN. is explicit in requiring the notice of appeal to be addressed. Sub-sec. (b) of sec. 880 is equally explicit in requiring that the notice shall be "in the form NNN." It is therefore submitted, with all deference, that where the address is omitted, the notice is no longer in a "form to the like effect" (sec. 982), nor can it be said that the omission is, in this instance, a variation "to suit the case," which sec. 982 allows.

As was pointed out by Wetmore, J., in *Cragg v. Lamarsh*, the Imperial Act, under which *The Queen v. Justices of Essex*, [1892] 1 Q.B. 490, was decided, differs materially from the Code in that no form of notice is thereby prescribed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND J., GRAHAM, E.J., AND MEAGHER, J.

Re RUGGLES.

Certiorari—When the appropriate remedy—Effect of statute taking away right of certiorari—Want of jurisdiction—Double remedy of certiorari and appeal—Discretion to refuse writ—Cr. Code secs. 886, 887.

1. **Certiorari** and not appeal is the appropriate remedy to raise the question of want of jurisdiction, ex. gr., whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest.
2. A statutory provision taking away the right to a certiorari does not deprive the superior court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction.
3. When there is a defect in the jurisdiction of justices or inferior courts, the common law right of certiorari should not be refused merely because a new trial might be had by means of an appeal.
4. Even where an appeal is pending, a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal.
5. A writ of certiorari may be claimed by the Crown as a matter of right on application of the Attorney-General without the production of any affidavit.
6. Except where applied for on behalf of the Crown, a certiorari is not a writ of course, and the court must be satisfied that there is a sufficient ground for issuing it.
7. No more latitude is given the court for the exercise of its discretion in granting or refusing a certiorari than in respect of other applications which are in the discretion of the court.

THIS was an appeal from the judgment of McDonald, C.J., at Chambers, refusing an application for a writ of certiorari to remove into the Supreme Court a judgment entered up by a justice of the peace for Lunenburg against the applicant for the sum of \$3.37 debt and \$1.80 costs. The grounds of application are fully set out in the judgment.

J. J. Power, for appellant.

Jas. McDonald, for respondent.

HALIFAX, January 25, 1902.

The judgment of the majority of the Court was delivered by

GRAHAM, E.J. :—

This is an appeal from a judgment in Chambers refusing an application for a writ of certiorari to remove into this court a judgment of a justice of the peace in a civil action of debt.

There was a short service of the writ of summons. By R.S.N.S. 160, sec. 12, service must be made at least five days before the trial. This was not done, yet the justice proceeded with the trial in the absence of the defendant.

On the day of the trial there was not any proof on oath that the debt was due, nor was there any "confession in person by the defendant or writing under his hand" that it was due. In my opinion, there is no default judgment without proof of the debt in that court, and sec. 19 requires either one of these alternatives to be complied with on the day of the trial—that is, the return day of the summons. As a fact the defendant did not appear.

The justice thought that the defendant, on a day between the date of the service and return day, in a private conversation with him, had admitted the liability. This was not sufficient. Perhaps if it had then been handed in in writing it might have been sufficient. But without sworn testimony at the trial proving this verbal admission made to the justice, it could not be acted upon.

Short service and want of proof of the debt rendered the judgment open to attack for want of jurisdiction. A waiver is relied on. The justice in his affidavit states that during the succeeding week and subsequently the defendant promised to pay the judgment. Then, when he threatened the defendant with proceedings under the Collection Act, he applied for this writ.

No definite time was given in which to pay the debt, and there was no agreement which would prevent the justice from

issuing an execution at any time. The justice had taken no step in the action, as if he was acting upon the footing of this alleged promise to pay. I cannot see that after he entered judgment he could have done anything in the action to make the proceedings valid as against the defendant. So it could not be said that he was prevented from taking such a course in consequence of the alleged promise that the defendant would pay the debt.

A promise to pay did not admit the validity of the judgment but only that the debt was due, so that there is nothing inconsistent in the defendant's conduct when he applies for a writ of certiorari after the justice threatens to proceed against him under the Collection Act: *Anonymous*, 1 Dowl. Prac. 23.

In my opinion there was not a waiver, nothing which would make the judgment valid or preclude the defendant from saying it was not valid. Moreover, Mr. Ruggles has produced an affidavit on this hearing denying categorically the alleged promise to pay the debt before the return day, and also the alleged promise to pay the judgment after it was entered up. The learned Judge, after dealing with this point, says: "I am further of opinion that under the decided cases the defendant had a remedy by appeal, and that certiorari will not lie; the application will be dismissed with costs."

For fear it will be forgotten, I wish to say that there is nothing in that statement to justify the contention now made to support it, that the Judge exercised his discretion in refusing the writ on the ground that there was an appeal from the judgment of a justice of the peace. It was refused on the ground of the admission and waiver, and further, because as there was an appeal "certiorari will not lie."

There is nothing in the statute relating to the civil procedure of justices which takes away the writ of certiorari.

The provision as to the nature of the appeal in such a case is as follows:—R.S.N.S. 156, sec. 74: "Every contested appeal shall be heard anew, and the Court shall give such judgment or make such order as the law and evidence require, whether such

judgment or order confirm, reverses, or varies the judgment appealed from."

There is no doubt that in this Province the writ of certiorari existed before the right of appeal, as in cases in the Inferior Court of Common Pleas, and there was a very old statute which provided that the Supreme Court might, in a case removed from an inferior court by a writ of certiorari, enquire into the facts anew and order a trial by jury: Acts of 1799, ch. 5. Even after there was a statute giving appeals, the writ of certiorari was also used as a substitute for an appeal in cases in which the appeal had been lost or was defeated, and in such cases, with the statute to which I have referred still in existence, the Court exercised purely appellate functions although the case had been brought up by writ of certiorari. But it was never held that the existence of an appeal displaced the remedy by means of a writ of certiorari.

I call attention to a judgment of this Court to which the learned Chief Justice was a party, delivered by the late Mr. Justice Rigby. In *Tupper v. Murphy*, 3 R. & G. 187, he says: "Another ground relied upon was that the defendant being entitled to an appeal under the statute, the certiorari should be quashed. The right to this writ, being a beneficial one for the subject, cannot be taken away without express negative words." In *The Queen v. Willets et al.*, 7 Q.B. 516, it was held that although the time for appealing had not expired, a certiorari might be obtained. In *King v. Harmon et al.*, Andrews 343, it was decided that where two parties have the right to appeal, and the time for appealing is fixed by the law, it is not reasonable to grant a certiorari till the time is elapsed. The right to this writ, where the party had an appeal, came before the Supreme Court of New Brunswick in *Ex parte Montgomery*, 3 Allen 149, and it was held that the right remained notwithstanding the statute gave an appeal, and several English cases were cited in support of this. It is true that in *Crawley v. Anderson*, N.S. Decisions, vol. 1, p. 385, in which a certiorari was quashed by this court on the ground that the affidavit on

which it was granted was entitled in the cause, which was held to be a fatal defect in point of form, in giving the judgment of the court, the then Chief Justice remarked that the writ ought not to issue when the statutable right of appeal has not been lost or defeated. In *Eagar v. Carey*, 1 R. & G. 50, the same learned Judge, during the course of the argument, interpolated the statement that this court had always held that certiorari did not lie where there was an appeal; but the judgment of the court, given at a later day and after deliberation, does not repeat the proposition thus enunciated. I do not think that either of these cases is sufficient to conclude us in a case like the present from holding that because the statute gives an appeal from the lower court, the suitor's common law right to certiorari has been thereby taken away.

The same thing had been held before in *Reg. v. Chipman*, 2 Thomson R. 292.

There is in the 5 English Ruling Cases 445, a leading case to the same effect: *Reg. v. Jukes*, 8 T.R. 542. This is the head-note: "If a statute authorizing a summary conviction before a magistrate gives an appeal to the sessions, who are directed to hear and finally determine the matter, this does not take away the certiorari even after such an appeal made and determined." A more modern case is *Regina v. Allen*, 4 B. & S. 915, and in the case of *Reg. v. Slade*, 72 L.T.N.S. 568, Cave, J., said: "Here this defendant went on to appeal to the Quarter Sessions against the conviction, and did not come here to this court to have it quashed, which he might have done."

Indeed, the very expression contained in the Rule of Court, made in the time of Queen Anne, which is referred to in the case cited by Mr. Justice Rigby, shews that one remedy did not exclude the other. "By a general rule of Court, no certiorari shall be granted to remove an order of justices from which the law has given an appeal to the sessions, before the matter is determined on the appeal, because it hinders the privilege of appealing, and if any order be removed before appeal, it shall be sent down again." And the Court said: "But when there

are two parties having a right to appeal, and the time of appealing be fixed by the law (as in the case of settlement where the time is limited to the first session), it is not reasonable to grant a certiorari till the time is elapsed, and so is the rule in *Salkeld* 147, to be understood."

I think that when the late Chief Justice uttered the dictum disapproved of by Mr. Justice Rigby, he had in mind cases in which the writ of certiorari was sought to be used as a means of appeal—that is to say, a review of the merits; that he did not intend to say that the appeal deprived the Court of its corrective powers over inferior tribunals which were proceeding without jurisdiction.

The Supreme Court originally exercised the appellate jurisdiction from justices, but when the County Courts were established that jurisdiction, together with the summary jurisdiction (namely, the jurisdiction to try small cases of debt under \$80), was transferred to the County Courts.

Thereupon the Supreme Court held that, where cases were sought to be removed by writ of certiorari, inasmuch as the Court had not, in consequence of this transfer of jurisdiction, power to enquire into the facts anew under the statute to which I have referred, it would not grant the writ. These cases were *Eager v. Carey*, 1 R. & G. 49; *Blais v. Richards*, ib. 205; and *Wallace v. King*, 20 N.S.R. 287. There was something additional held in the latter case. The recognizance given was bad, and on that ground alone the certiorari could have been quashed. But reference was also made by Mr. Justice McDonald to the apparent conflict in the opinions of the late Chief Justice and Mr. Justice Rigby. He said that the granting of the writ of certiorari was in the discretion of the Judge applied to. Then he said that the inexpensiveness and advantage of an appeal over a writ of certiorari should be taken into consideration by the Judge in exercising his discretion. In *Re Rice*, 20 N.S.R. 294, where the Judges were equally divided, the same learned Judge spoke more clearly. He said: "I am far from thinking that the fact of a right of appeal existing is

alone a good reason for refusing writs of certiorari *in all cases*. What I do think is that in such a case the application should disclose sufficient reasons for not adopting the remedy by appeal, which is a comparatively inexpensive and expeditious one before a tribunal which is competent to deal with the law and the substantial merits of the case, so as to justify a course which does not promise all these advantages but often defeats the rights of the parties upon mere technicalities." Moreover, he said: "Having exercised such discretion as by law belonged to him (there the Judge had refused the writ), with ample authority to justify his decision, we would be going too far if we overruled his order." He apparently forgot that in *Wallace v. King* he had overruled the Chief Justice's exercise of discretion if he really made that one of his grounds for quashing the writ in *Wallace v. King*, *supra*.

However, Mr. Justice McDonald never put forward the view that the existence of one remedy absolutely excluded the other. In fact, he admits that the writ is not to be refused in all cases merely because there is an appeal. Then both remedies may be open. It must be apparent that the learned Judge was dealing with those cases in which it was sought to use the writ of certiorari as a means of appeal to review the merits, and not with its use to correct the action of inferior courts when they were proceeding without jurisdiction. The fact that he referred to the Supreme Court, under the decisions, not now having the power to try the case anew, shews that this was in his mind. But he said nothing which would justify the assumption that when there was a defect in the jurisdiction the Supreme Court would stay its hand, merely because there was a new trial to be had in the County Court by means of an appeal. Indeed, it may be implied from what he said that those were some of the cases in which the writ was not to be refused merely because there was an appeal. It is not to be supposed that what was said by him about the granting of the writ being in the discretion of the Judge applied to, is authority for the position that when it appears there is a statute which gives an appeal,

the Judge can do as he likes about granting a writ—that the remedy is subject to his whim. I think the learned Judge was simply saying that where a writ of certiorari is sought for, to enable the Court to exercise purely appellate functions, the discretion might be exercised according to the adequacy and appropriateness of the remedy by appeal, and that reasons should be given for not resorting to it if, in the particular case, it was adequate and appropriate.

When it is said that the granting of the writ of certiorari is in the discretion of the Judge or tribunal applied to, care must be taken to ascertain what that expression means. The writ might at any time be claimed by the Crown as a matter of right, and it issued as of course when applied for by the Attorney-General, and without the production of any affidavit.

It was thought that the defendant had the same right, but it was held otherwise in the case of *Rex v. Eaton*, 2 T.R. 89.

There Erskine “objected that the defendant ought to lay a ground by affidavit before the Court granted a certiorari . . . for if every defendant were at liberty to remove a conviction of course, this great inconvenience would result from it, etc.”

Baldwin contended “That the practice of the Court had always been to grant a certiorari of course upon the application of either party.” But Buller, J., said: “The language of the Court has always been that the King has a right to remove proceedings by certiorari of course, but that where a defendant makes an application of this sort he must always lay a ground for it before the Court.”

Thereafter it became a common thing to express the effect of this doctrine that a defendant was not in the position of the Crown by saying that the granting of the writ to a defendant was in the discretion of the Court. But it never had been held that there was more latitude in exercising the discretion as to granting or refusing a writ of certiorari than there was in the granting of any other application in the discretion of a tribunal. It was, indeed, contended that a person with a grievance might be denied the writ, that he was not entitled to it *ex debito*

justitiæ. According to a note of the learned authors of 1 Smith's Leading Cases, appended to the report of *Crepps v. Durden*, page 659, this was settled by the case of *The Queen v. Justices of Surrey*, L.R. 5 Q.B. 466. In that case two justices had made certificates closing up three roads meeting in the form of a Y, Benbow corner being the junction. Notices of the making of the proposed application for the certificates were posted at the three termini, but there was none at the Benbow corner. The statute required a notice to be posted at "each end" of the highway. There was an appeal to the Quarter Sessions, and this point might have been taken on the appeal but it was not. The certificates were confirmed. Then the writ of certiorari was applied for.

It was contended, among other things, in shewing cause: "In the first place there has been an appeal, and this objection might have been taken and was not; the certificates and orders are good on their face, and the Court will not, on a motion for certiorari, notice objections raised by affidavit when they might have been before the sessions on appeal." Blackburn, J., pages 471 and 472, said: "We think it clear that the actual publication of the prescribed notices is made a condition precedent to the jurisdiction of the two justices, etc." "It was then argued that what really was done gave notice to the public quite as effectually as what the statute prescribed . . . and that the applicant in fact knew of all that was done, and that there had been an appeal by a party grieved to the sessions, and that it is only after the verdict of the jury was found against the appeal that he applies to this Court for a certiorari. And it was urged that the writ of certiorari was not of right, and that this Court in its discretion would not issue it to give effect to an objection certainly not affecting the merits. On this we took time to consider, as the question to what extent the Court is bound to grant a certiorari or may in its discretion withhold it, is one of great importance. It is quite clear that except when applied for on behalf of the Crown, the certiorari is not a writ of course. The Court must be satisfied on affidavit that there is a sufficient,

ground for issuing it, and it must in every case be a question for the Court to decide whether in fact sufficient grounds do exist. But in the present case we are satisfied that in fact no notice was affixed at Benbow corner, and that therefore the orders complained of were made without jurisdiction, and the question arises whether this Court ought to refuse the certiorari."

Then, after referring to the authorities, one of them which he distinguished being *Reg. v. South Holland Drainage Committee*, 8 Ad. & El. 429, in which, when the applicant whose land had been expropriated had expressly waived the notice to treat, and had requested the other party to summon a jury to assess the land damages for a day too near to admit of proper notice being given, applied for a writ of certiorari to quash the inquisition upon this and other grounds, the writ was refused; he proceeds: "In other cases where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated like a writ of error, as *ex debito justitiæ*; but when the applicant is not a party grieved (who substantially brings error to redress his private wrong), but comes forward as one of the general public having no particular interest in the matter, the Court has a discretion, and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person."

In *The Queen v. Drury* (1894), 2 Ir. R. 489, the Chief Justice, at page 499, says: "In support of this view, and in reference to the principles upon which the Court acts in granting the writs, I would refer to the leading case upon the subject—*Reg. v. Justices of Surrey*, *supra*—a case of the very highest authority, decided by the most distinguished Judges—Cockburn, Blackburn, and Mellor. All through the discussion of the present case, and indeed in the books of practice, there has been a certain vagueness as to the principles which regulate the granting of the writ of certiorari. It was said, or rather I should say admitted, that the granting of the writ was always

and under all circumstances not *ex debito justitiæ*, but resting in the all but absolute discretion of the Court. Now, the whole subject was carefully reviewed in *Reg. v. Justices of Surrey*. All the authorities were collected and cited in the argument, and judgment was given by that very distinguished Judge, Lord Blackburn," and he cites the extracts already made.

In *Rex v. Groom*, 70 L.J.K.B. 636, Lord Alverstone, C.J., in an application for a certiorari, said of it: "I confess that if I could have seen my way to decide against persons who are only rivals in trade, and who having taken an objection of a highly technical character (namely, that a notice which did not affect them was served two days too late), walked out of the room, I should certainly have done so. . . .

"It would be too strong for us, after *Reg. v. Surrey Justices*, to say that the prosecutors are not entitled to a writ of certiorari if we are right in the view that the justices had no jurisdiction to hold an adjourned meeting in October."

Bearing in mind the distinction between the use of the writ as a means of appeal and the use of it to prevent inferior tribunals from exceeding the limits of their jurisdiction, the law is comparatively clear. I can find no English case in which the writ was ever refused when there was a want of jurisdiction in the inferior tribunal, whether an appeal was open to the applicant or not. There are cases of the other sort, namely, where there was an appeal and (in most of them, at least) the remedy by certiorari was taken away; then, when it was sought to review by way of appeal the merits of the case, the Court has intimated that the writ was taken away, and there was an appropriate remedy by appeal. Such cases are *R. v. Whitehead*, Doug. 550; *Reg. v. Cambridgeshire*, 4 A. & E. 121; *Regina v. Middlesex*, 9 A. & E. 548; and *In re Blewett*, 14 Law Times N.S. 598.

There is affirmative authority:—

In *The Queen v. Allen*, 4 B. & S. 918, counsel argued that an appeal was then pending in the Common Pleas, and, therefore, the defendant had no right to a certiorari, citing *Rex v.*

Sparrow, 2 T.R. 196. But Cockburn, C.J., said: "Unless we can see that the case before the Common Pleas involves the question whether the justices had jurisdiction, we ought not to withhold the certiorari. If the justices had no jurisdiction to find the facts stated in the case, the jurisdiction of the Common Pleas to hear the case is gone, and the Court will strike it out."

In *Reg. v. Starkey*, 6 Manitoba R., p. 589, Taylor, C.J., said: "It is not necessary for the applicant to shew what has been done in the matter of the appeal. Even if an appeal is now pending and being proceeded with, his right to a writ of certiorari is not thereby affected. At all events, it is not so unless the question of jurisdiction is the one raised on the appeal. It could not be so on an appeal under sections 126 and 127."

In *Reg. v. Starkey*, 7 Man. 47, a case in which notice of appeal had been given before applying for the writ of certiorari and abandoned, the same experienced Judge said: "By section 84 of 'The Summary Convictions Act,' R.S.C. ch. 178, 'No writ of certiorari shall be allowed to remove any conviction or order had or made before any justice of the peace if the defendant has appealed from such conviction or order to any Court to which an appeal from such conviction or order is authorized by law,' but it seems still open to the defendant to maintain the present proceeding upon any ground which impeaches the jurisdiction of the magistrates."

See also the case of *Reg. v. Montgomeryshire*, 15 L.T.N.S. 290; Paley on Convictions, 7th ed., pages 358, 359.

This doctrine is assented to over and over in England, that the writ of certiorari is not to be taken away by implication. Nothing but an express provision of a statute can take it away: *Rex v. Morley*, 2 Burr. 1040; *King v. Reeve*, 1 W. Bl. 231; and *Reg. v. Jukes*, already cited.

It is very old, and often reiterated, that although there is a provision in a statute taking away the writ of certiorari, it does not deprive the Superior Court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction. And

it would be a novelty that a provision granting an appeal should restrict the power to correct a proceeding by certiorari more than a provision taking away the writ altogether. The fact is that for want of jurisdiction in an inferior court, the writ of certiorari is the appropriate remedy and an appeal is not.

The inquiry is generally in respect to matters collateral and extrinsic to the adjudication impeached. In *Colonial Bank v. Willan*, L.R. 5 P.C. 443, the distinction is pointed out: "There must of course be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But these conditions may be founded either (1) on the character and constitution of the tribunal; or (2) upon the nature of the subject-matter of the inquiry; or (3) upon certain proceedings which have been made essential preliminaries to the inquiry; or (4) upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the other three classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously in most cases depend upon matters which, whether apparent on the face of the proceedings or brought before the Supreme Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact which, though essential to the validity of his order he was competent to try, assumes that having general jurisdiction over the subject-matter he properly entered upon the inquiry, but miscarried in the course of it. The Superior Court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal, and the power to re-try a question which the Judge was competent to decide." Again the learned Lord, at page 445, said, "And the question is—within which class the present case falls." He shews carefully and at length that there was jurisdiction to make the order, namely, that there was a debt due and that there was evidence in support of it, "since the affidavit

filed in support of the petition distinctly swears to the debt." He adds: "This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a re-trial of the question of the petitioning creditor's debt, and that upon evidence which was not before the inferior court."

These matters, which are extrinsic or collateral to the adjudication and which affect the jurisdiction, may require to be brought forward upon affidavits, and are not the matters in issue in the cause and which the witnesses may be asked about on the trial of the appeal.

Take the case of a justice trying an action of debt exceeding in amount the sum of \$80, or a justice of a wrong county trying a case, an appeal would be dismissed on the ground that the court below not having jurisdiction over the matter, the court of appeal would have none.

Or, take the case of a justice disqualified through interest. Nothing in the law compels a defendant to attend before such a Judge to go through a trial and assert an appeal in order to have a trial de novo in the court of appeal. He is not asking for a trial de novo; he is seeking a remedy for being summoned before an improper tribunal. Plaintiffs must at their peril abstain from bringing defendants before a disqualified tribunal, and they cannot justify such a course by saying there is an appeal on the merits if you do not like to be tried by a disqualified justice.

To raise the question whether proper service has been made and jurisdiction over the person acquired, certiorari is an appropriate remedy: *Reg. v. Smith*, L.R. 10 Q.B. 604. Appeal is not an adequate remedy, because the defendant, in order to assert his appeal, gives the Court jurisdiction over his person.

There is an authority of this Court on that very point, and it is a case over thirty years old: *Rand v. Rockwell*, 2 N.S.D. 199. The summons had been left at the defendant's residence but not personally served. It was held as follows:—

"Also that defendant having appealed and thus virtually appeared, and having avoided the judgment below by having

taken an important step in the case, it was not competent to him to repudiate the jurisdiction of the Court below on the ground of want of personal service. Had he wished to avail himself of such an objection he should not have appealed, but should have sued out a writ of certiorari." There is strong support for this judgment in *The Commissioners of Warwick v. Judges of Orange County*, 13 Wend. 433.

There is a suggestion made here which I cannot adopt. That is, that because the justice of the peace had jurisdiction to do something (I suppose over the subject-matter, for he might certainly have dismissed the case) the defendant is not to have the writ. Surely in cases before these inferior tribunals it is necessary to have jurisdiction over the person. The writ of certiorari has been granted so often to quash orders of inferior courts for proceeding without notice that it cannot be necessary to cite authority. Lord Colville, in the case of the *Australian Bank v. Willan*, already cited, speaks of "jurisdiction of inferior tribunals depending upon certain proceedings which have been made essential preliminaries to the inquiry." Surely notice is one of them. The case of *Reg. v. Justices of Surrey*, already cited, was a case of absence of constructive service by posting up a notice. In *Reg. v. Farmer*, [1892] 1 Q.B. 637, a certiorari was granted because service of a summons was made at a house which the defendant had left for a residence in America, the former not being "his last place of abode." Lord Esher, M.R., said: "If there was no service of the summons, the magistrate had no jurisdiction to make an order on it." There is no difference between short service and no service. It is an inferior tribunal for one reason. Then the defendant has not in that tribunal the procedure for an application to set aside the defective service. There is no provision for making or using affidavits for such a purpose. He must come to this Court by means of a certiorari to get the procedure which enables him to get redress for that short service. I have to contend with another suggestion which I cannot help regarding as an obvious fallacy. Certain decisions in our own Court

are referred to as tending to shew that upon an appeal from justices, the Court of Appeal has exercised corrective jurisdiction over the proceedings of an inferior tribunal by quashing them for irregularity and without trying the cause de novo, therefore shewing that a defendant in some way or another has, by means of an appeal, got a remedy for the particular defect. They are the cases of *McLean v. McKay*, 1 R. & G. 383, where a capias issued by a justice without any affidavit was quashed: *Rose v. Burke*, 1 R. & G. 94, where a bad conviction was quashed without a trial de novo; and *Graham v. Lapierre*, James R. 139, where the Supreme Court intimated that if the defendant had (upon an appeal) moved to quash some irregular proceedings of a justice at another time he might have succeeded.

But it is not sufficient merely to shew that an appeal would afford a remedy. Mr. Justice McDonald admitted that both remedies may be open, and *Rex v. Jukes* (supra) has proved it. It must be shewn in addition that the writ of certiorari is not the proper and appropriate remedy. And who will deny that convictions, bad on their face, have been quashed on writs of certiorari from time immemorial? Or that the writ of certiorari is not the proper and appropriate remedy for setting aside a judgment or conviction when there has been defective service of the summons in a case in an inferior tribunal? The remedy by appeal, as I have said, is altogether inadequate, and not appropriate in a case in which there has been defective service, because to raise the question by appeal the defendant must waive the defect by appearing in the case to assert an appeal. It is suggested that the defendant may have an appeal by appearing at the trial under protest. Then he will be obliged to go through two trials, and an appeal, and all under protest, before he can have a judgment in respect to the defective service. The appeal bond contemplates, by its recital, judgment after a trial. It must be in double the amount of the judgment, and must be given to respond the judgment. I am of opinion that for such a defect an appeal is not an adequate remedy, and

I have doubt as to the adequacy of a protest in such a case. It was never resorted to in the case of short notice of trial in a civil case in the Supreme Court. It seems to be attended with great danger.

In *The Queen v. Doherty*, 32 N.S.R. 235, it is said in the reporter's note: "On the return day of the summons, counsel for defendant appeared and took objection that the service was insufficient, the constable by whom it was effected not being a constable for the municipality of the county of P. The constable was called, and was cross-examined (no doubt to prove the defect), under protest by defendant's counsel, who then retired; and the magistrate, after hearing evidence as to the commission of the offence charged, etc., convicted him. Held, affirming the judgment of Meagher, J., refusing a writ of certiorari, that the appearance by counsel cured the defect, if any, in the service." In Mr. Justice Meagher's judgment this appears: "The appearance, however, cured any defect there may have been in the service. I do not say there was any (citing authority). In *Harvey v. Hall*, 31 L.T.N.S. 391, it was held that appearing by counsel to object to a notice of motion on the ground of the want of personal service is a waiver of the objection itself."

In dealing with a civil case in the Supreme Court, viz., *Dominion Coal Co. v. Kingswell*, 30 N.S.R. 400, Mr. Justice Ritchie said: "It was contended that the appearance was under protest, and that defendant's rights were not waived thereby. Such an appearance is not known to our practice, but even if the defendant's right to object to the legality of the service could be protected by a protest in the appearance, that has not been done."

If the service was so short that the defendant could not arrive at the trial in time to make a protest, I suppose the writ would not be refused. And it does seem strange that he should be required, where there is time to attend, to do so in order merely to protest. If the law is as is stated in *The Queen v. Doherty* (supra), he is never safe even in protesting.

In *Rand v. Rockwell*, where a defendant defectively served with process did not appear, but appealed, it was held that he should have sued out a writ of certiorari instead, and now when a defendant defectively served applies for a writ of certiorari, he is to be told that he should have appealed; stare decisis. See the cases referred to in the letter published in *Re Wallace*, L.R. 1 P.C. 286.

There is another point. When a defendant does stay away from a trial, he takes a risk, but he is entitled to rely upon the requirements of the law applicable to such default being complied with. Even in cases of default in a superior Court, the defendant is entitled ex debito justitiæ to move to set aside that default for an irregularity in obtaining it: *Anlaby v. Pretorius*, 20 Q.B.D. 764; *Hughes v. Justice*, 63 L.J.Q.B. 417.

Here the plaintiff did not comply with the provision requiring the debt to be proved notwithstanding the defendant's absence. For that miscarriage the writ of certiorari is the only adequate and appropriate remedy. The remedy by appeal, if it exists at all, is not adequate or appropriate. It is contrary to legal principles that a defendant who has not appeared should have an appeal. How can he ask to have a case tried de novo in an appellate court, when he has below, by not appearing, waived the right to a trial in that lower court? The form of bond, on an appeal, contemplates that the appeal is taken after a trial. The Court did not hold in *Rand v. Rockwell*, supra, that a defendant who asserted an appeal, without having appeared, had a good appeal. It held only that by appealing the defective service had been cured.

The case of *Wallace v. King*, 20 N.S.R. 283, does not decide that a defendant who does not appear at a trial may appeal. But only this, and it was a dictum, that as there was a right of appeal existing in the Court below, of which the defendant had not availed himself, he should not have a writ of certiorari. In suggesting that he should have appealed, it was surely suggested also that he should have taken the necessary steps to obtain an appeal.

But there is express authority of our own Court that the case must be tried below, at least partially, or there will be no trial above.

McCully v. Barnhill, Cochran 81, was an action for breach of the License Law before a justice. The plaintiff produced no witnesses before the justice, but was nonsuited, and appealed. A rule nisi was taken to set aside the appeal. Dodd, J.—“It was the intention of the Legislature that these small suits should be tried before justices of the peace to save expense. It would be monstrous if the plaintiff should be allowed to go through the farce of summoning the defendant, and then, without calling any witnesses, should be allowed an appeal to this Court. I think the appeal should not be allowed.” Desbarres and Wilkins, JJ., concurred, Bliss, J., dissented. The rule was made absolute, confirming the judgment of the Court below.

If this is the law in the case of a plaintiff not calling witnesses at the trial, surely it is so in the case of a defendant not appearing at all. But if the defendant has lost his appeal here by not appearing, he has not lost his right to a writ of certiorari. He could not anticipate that, when he did not attend on the return day of the summons, the justice would proceed without proof of the debt. There is nothing that I know of in the law which would require him, in the interest of the plaintiff, to attend for the mere purpose of preventing the justice from making mistakes from proceeding without proof of the debt. Otherwise, a defendant occupies an unfortunate position. Irregularities are generally taken advantage of by a motion to set aside the defective proceeding. He cannot move before the justice upon affidavit or otherwise to set aside the judgment on the ground that the debt was not proved. The justice court has not the procedure to enable him to do that: *Orwitz v. MacKay*, 31 N.S.R. 243. There the Court of Appeal, unless it has it by statute, has no greater power than the Court below has. If an appellate court should exercise powers in a cause which comes to it upon an appeal in excess of those which the Court below could exercise, then the higher Court, in

respect to that excess, is acting as a court of original jurisdiction and not as a court of appeal. The very nature of an appeal is to correct the erroneous decision of an inferior tribunal on questions actually presented to the inferior tribunal, or which could have been presented to it, and which have not been waived. It is not to get something done in the appellate court which the statute does not enable the Court below to do. The cause is continued above as it was below.

Now, there is no statute which enables the County Court on an appeal to do more than try the cause and give the judgment which the Court below should have given.

And it was useless to appeal the cause with any idea that, when it came into the appeal court, a motion could be made on affidavits not used below to set aside the judgment, upon the ground that the debt had not been proved before the justice. A trial *de novo* would not overtake that wrong which has been done to the plaintiff.

The justice could not set aside the judgment of the Court above on the appeal. The only course open in the Court appealed to would be to try the case anew. And then it could not be brought into the trial that in the case before the justice he had proceeded without proof of the debt. In *Warwick v. Orange*, 13 Wend. 433, the Court said: "The proceeding by appeal was not intended to be a review of legal questions or of irregularities that might exist in the preliminary steps, as on *certiorari*." By appealing from the judgment to avail himself of his right to set aside an irregularity, he would bring on a trial and judgment which would not touch the thing complained of. In the case of *McLean v. McKay*, *supra*, the justice could, no doubt, have dismissed the action on its being called to his attention that he had issued the *capias* without an affidavit. And the Court of Appeal would possibly have the same power. No doubt the same thing may be said of the irregularities which existed in *Graham v. Lapierre*, *supra*. But how are collateral matters, requiring proof to disclose the

defect, to be disposed of in an appeal where there are no affidavits or materials used below and sent up?

In *Rose v. Burke*, supra, there was a defective conviction, and the Court of Appeal had not the statutory power to make a good conviction. Therefore, it was of no use to try the cause de novo. If there is either no remedy by appeal, or if the remedy by appeal is not adequate or appropriate to redress the grievance caused by the justice entering up judgment without proof of the debt, the remedy by certiorari is not to be denied to the defendant.

Upon both grounds—namely, because there was short service, and because there was no evidence of the debt—I am of opinion that the application for the writ should have been granted.

It is contended that there is no appeal from the judgment of the Judge in Chambers refusing the application for the writ. That depends upon the peculiar words of Order 57, R. 17.

The Crown Rules, Rule 127, provides that this Order 57 shall apply to all civil proceedings on the Crown side. But Rule 17 of that Order provides as follows: "Rules 1, 2, 3, 4, 5, etc., of this Order shall only apply to appeals in causes or matters originating in the Supreme Court or in the County Courts." The obvious answer is that an application for a writ of certiorari originates in this Court. Whether, when the cause is brought up into this Court and proceedings are taken on motion in that cause so brought up there is a cause which originated in the justices' Court, is another matter.

But there is another answer. The object of Rule 17 is comparatively clear. There are a number of appeals from inferior jurisdictions, such as Courts of Probate, the Commissioner of Mines, Municipal Courts, Magistrates, and even the County Council. Special provisions in respect to those appeals are generally contained in the special Act conferring the jurisdiction. They are appeals to the Supreme Court, and more generally to the County Court. In respect to those appeals from the inferior jurisdictions, it was not intended that the

rules of Order 57 should be applicable. They would be unsuitable, and would create confusion. But they are to apply only to those appeals from judgments of the Judges of the Supreme Court and County Courts. So that Rule 17 obviously must mean that these other rules of Order 57 shall only apply to appeals originating in the Supreme Court or County Courts.

In my opinion, the appeal should be allowed with costs, and the writ should issue.

TOWNSHEND, J., concurred.

MEAGHER, J., dissented.

Certiorari granted.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE FALCONBRIDGE, C.J.K.B., AND STREET, J., SITTING AS A
DIVISIONAL COURT.

THE KING v. LEESON.

Disqualification of justice—Bias—Transient trader's license by-law—Prosecution of person in same trade as magistrate—Rival business—Ontario Municipal Act, R.S.O. 1897, c. 223, s. 583.

1. A magistrate who is engaged in the same kind of business as a trader prosecuted under a transient trader's license law is thereby disqualified from adjudicating upon the charge.

ARGUED: March 8, 1901

DECIDED: April 15, 1901.

Motion by defendant to make absolute an order nisi to quash conviction of defendant for offering for sale and selling goods or merchandise in the town of Arnprior contrary to the by-law for licensing, regulating and governing transient traders in the said town. It appeared that defendant went to Arnprior

and opened a store for sale of crockery, glass, woodenware, etc., on the 1st August, 1900, after procuring a lease of the building for one year, with privilege of renewing for another year. He is not on the assessment roll, but asked to be assessed as to income and offered a bond as security for income tax.

TORONTO, March 8, 1901.

Du Vernet and *B. N. Davis* for defendant: The Mayor of Arnprior had no power to sit for the police magistrate, and was disqualified also by reason of being engaged in the same business as defendant: the by-law is *ultra vires* because wider than the sections as to transient traders in the Municipal Act: and the conviction is bad because for more than one offence, and because it does not follow the minute of conviction and imposes imprisonment in default of payment of costs contrary to the by-law. Defendant's counsel referred to *Reg. v. Chapman*, 1 O.R. 582; *Reg. v. Steele*, 26 O.R. 540; *Reg. v. Rawson*, 22 O.R. 467, sec. 702 (3), C.C.; *McLeod v. Kincardine*, 38 U.C.R. 167, sec. 708, C.C.; and *Snell v. Bellgrove*, 30 U.C.R. 89; *Reg. v. Roche*, 32 O.R. 20; *Reg. v. Chayter*, 11 O.R. 217.

W. M. Douglas, K.C., for magistrate, contra, referred to *Reg. v. Caton*, 16 O.R. 11; *McCutcheon v. Toronto*, 22 U.C.R. 613; *Reg. v. Coulson*, 24 O.R. 246.

TORONTO, April 15, 1901.

The judgment of the Court was delivered by

FALCONBRIDGE, C.J.:—It is only necessary to read the affidavit of the convicting magistrate to see that he was disqualified to sit or adjudicate on this case by reason of his being engaged in the same kind of business as the defendant. He is a grocer and "incidental thereto" *i.e.* to the grocery business, deals in crockery and glassware. He exhibits and annexes the "proclamation" of the defendant wherein defendant professes in glassware to have a large assortment of lamps, berry sets,

fancy cups, etc., and further states that in crockery he is able to supply you with tea "sets," bedroom "sets," etc., etc.

We are not going to weigh in nice scales the extent to which the mayor and the defendant are rivals in *trade*, nor are we bound by the mayor's statement that he does not consider that defendant is conducting a business in opposition to his, the mayor's and convicting magistrate's.

The following cases contain references to the authorities, and are in point:—*R. v. Chapman*, [1883] 1 O.R. 582; *R. v. Sproule* (1887), 14 O.R. 375; *R. v. Brown* (1888), 16 O.R. 41; *R. v. Steel* (1895), 26 O.R. 542.

It is unnecessary to consider the other grounds of objection to the conviction.

Giving the convicting magistrate the benefit of the doubt as to his good faith in the premises, the conviction will be quashed without costs and the magistrate protected.

Conviction quashed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., GRAHAM, E.J., AND MEAGHER, J.

THE KING v. O'HEARON.

Proof of previous conviction—Canada Temperance Act, sec. 115 (a)—Statutory interrogation of accused after conviction—Defendant absent but represented by solicitor—Interrogation of solicitor—Solicitor's refusal to answer—Crim. Code sec. 850.

1. A solicitor appearing for the accused at the trial before a magistrate of a charge of a second or subsequent offence against the Canada Temperance Act represents his client for the purpose of being interrogated as to the previous conviction although the client is not then present; and the magistrate, on his failure to answer, is justified in receiving evidence of the previous conviction.

ARGUED: November 13, 1901.

DECIDED: December 28, 1901.

Motion on behalf of the defendant for an order to quash and set aside a conviction made against him on September 7 1901, by J. Medley Townshend, stipendiary magistrate in and for the town of Amherst, in the county of Cumberland, whereby the said Timothy O'Hearon was convicted as for a fourth offence against the provisions of the second part of the Canada Temperance Act, for unlawfully selling intoxicating liquor between the third day of July, 1901, and the 15th day of August, 1901, within the town of Amherst, contrary to the provisions of the second part of the Canada Temperance Act then in force in and throughout the said county of Cumberland.

The conviction had been brought up by a writ of certiorari, issued on behalf of the defendant.

The grounds urged in support of the application were that the procedure laid down and required by sec. 115, sub-sec. (a) of the Canada Temperance Act (ch. 106 Revised Statutes of Canada) was not complied with, inasmuch as, it being a case in which a previous conviction was charged, the magistrate did not, after finding the accused guilty of the subsequent offence charged, ask the accused whether he had been so previously

convicted as alleged in the information, and that in consequence the said conviction was unauthorized by law, and made without any jurisdiction.

The facts in connection with the case are set out in the judgment of GRAHAM, E.J.

HALIFAX, November 13, 1901.

Stuart Jenks, for the defendant.

T. Sherman Rogers, for the prosecutor.

HALIFAX, December 28, 1901.

The judgment of the Court was delivered by

GRAHAM, E.J.:—

This is an application to quash a conviction for a fourth offence under the Canada Temperance Act. The ground of the application is that the question whether the defendant had previously been convicted as required by sec. 115 (a) was not addressed to him personally by the stipendiary magistrate. What happened was this. The defendant had appeared, had given evidence, and had the benefit of a solicitor who examined and cross-examined witnesses, and addressed the Court for him. After the case had closed there was an adjournment for the purpose of giving judgment. At the adjourned date the solicitor attended, but the defendant did not attend. The question was addressed to his solicitor, and the stipendiary magistrate, not getting any reply to his enquiry, received proof of previous convictions and made the conviction in question. In my opinion the question need not be addressed personally to the defendant when he is represented by a solicitor. If a solicitor adequately represents a defendant in pleading to and trying the main case (and it is clear that he does under secs. 850, 854, 855, 856 and 857 of the Code), he adequately represents him in respect to this enquiry.

There are authorities on the point: *Ex parte Grieves*, 29 N.B.R. 543, and *Regina v. Kennedy*, 17 Ont. R. 159.

This is different from a case in which the defendant has not either personally or by solicitor appeared in the case. There the prosecution would at least have a remedy of a warrant to compel his appearance at the outset. That was the case of *The Queen v. Salter*, 20 N.S.R. 208. The application must be dismissed with costs.

MCDONALD, C.J., and MEAGHER, J., concurred.

Motion dismissed with costs.

Note: *Proof of previous conviction—Canada Temperance Act, s. 115 (a).*

Sec. 115 of the Canada Temperance Act (R.S.C., 1886, ch. 106), provides that the proceedings upon any information for committing an offence against any of the provisions of the same in case of a previous conviction or convictions being charged shall be as follows:—The justices or magistrate or other officer shall in the first instance enquire concerning such subsequent offence only, and if the accused is found guilty thereof he shall then, and not before, be asked whether he was so previously convicted as alleged in the information, and if he answers that he was so previously convicted he may be convicted accordingly; but if he denies that he was so previously convicted, or stands mute of malice, or does not answer directly to such question, the justices or police magistrate or other officer shall then inquire concerning such previous conviction or convictions. (Sub-sec. a.)

The omission of the magistrate to ask the accused whether he had been previously convicted does not deprive him of jurisdiction to receive proof of the prior conviction. *R. v. Wallace*, 4 Ont. R. 127, per Armour, J.; *R. v. Brown*, 16 Ont. R. 41 (Q.B.D.). (But see contra *R. v. Edgar*, 15 Ont. R. 142, per Rose, J.). In *R. v. Kennedy*, 17 Ont. R. 159, the defendant had been summoned for selling liquor contrary to the second part of the Canada Evidence Act. He appeared with his counsel at the hearing and pleaded not guilty when evidence was given for the prosecution sufficient to justify a conviction but at the defendant's request an adjournment was granted. At the adjourned hearing neither the defendant nor his counsel appeared and evidence was given of the service of the summons and of the facts that transpired at the prior hearing, and certificates of two prior convictions were put in and the identity of the defendant proved. The defendant was thereupon convicted of a third offence against the Canada Temperance Act. It was held by the judges of the Common Pleas Division that the defendant, having once had the opportunity to defend,

Note—Continued.

could not, by his failure to appear at the adjourned hearing, defeat the administration of justice and that he was properly found guilty in his absence.

In *Ex parte Groves*, 23 N.B.R. 38, it was held by a majority of the Supreme Court of New Brunswick that where a defendant appeared by attorney, he could be convicted of a second offence under the Act though he was not personally present to answer the questions whether he had been previously convicted. A person charged who authorizes an attorney to appear for him and defend authorizes him to answer the charge wholly. When a counsel states that he appears for a defendant, that must mean that he appears to answer fully; and without that it is no appearance at all, and the defendant must himself appear or the case can proceed for want of an appearance. *Ibid*, per Palmer, J., at page 42. That decision was followed in *Ex parte Grieves* (1890), 29 N.B.R. 543, on a charge of a third offence in which the defendant's attorney was asked the question and denied the previous convictions.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, HANINGTON AND PALMER, JJ.

Ex parte FITZPATRICK.

Canada Temperance Act—Sale of intoxicating liquors—Judicial sale—Sales by sheriff—Habeas corpus—Commitment on return of warrant of distress—Controverting justice's certificate of insufficient distress—Cr. Code sec. 872.

1. The Canada Temperance Act does not prohibit judicial sales of intoxicating liquors.
2. Under a warrant of distress upon a conviction for an offence against the second part of the Canada Temperance Act, the defendant's property must be levied on, though it consists of intoxicating liquors only, and is in a place where the second part of the Act is in force.
3. On a habeas corpus application under Consol. Stat., N.B., ch. 41, sec. 4, it may be shewn that the constable's return to the warrant of distress, that there was not sufficient property to satisfy it, is false, and that therefore the commitment based thereon, under which the party is imprisoned, was improperly issued.

ARGUED: October 5, 1893.

DECIDED: December 19, 1893.

THIS was an application to His Honor Mr. Justice Palmer, at Chambers, under ch. 41 of the Consolidated Statutes, for the discharge of the applicant, Catherine Fitzpatrick, who was imprisoned under a warrant of commitment issued on a conviction for an offence against The Canada Temperance Act. It appeared from the affidavits that by the conviction the applicant was ordered to pay a penalty of \$50 and costs, and in default of payment, it was adjudged that the same should be levied by distress and sale of the applicant's goods; and in default of sufficient distress she was to be imprisoned in the county gaol. The fine not having been paid, a distress warrant was issued and given to a constable to be executed. When the constable came to the residence of the applicant in search of goods whereon to levy, she pointed out a cask of rye whisky valued at \$150 belonging to her, wherewith to satisfy the warrant, stating that she had no other personal property. The constable refused to levy upon the whisky, and returned the

warrant with the endorsement that he had made diligent search and could find no sufficient goods and chattels of the applicant whereon to levy the fine and costs. The magistrate thereupon issued the warrant of commitment under which the applicant was imprisoned.

His Honor referred the application to the Court.

FREDERICTON, N.B., October 5, 1893.

A. I. Trueman, in support of the application: Sufficient goods of the applicant having been pointed out, the constable was bound to levy thereon, and the warrant of commitment was improperly issued. The fact that the goods consisted of whisky affords no ground for the refusal of the constable to levy, and no excuse for his false return. The second part of The Canada Temperance Act is directed against traffic in intoxicating liquors, and does not prohibit judicial sales. The Act is intituled "an Act respecting the traffic of intoxicating liquors," and its provisions are for the purpose of prohibiting the selling and keeping for sale of liquors by persons as a business or for profit.

L. A. Currey, contra: The Act being in force in the county, the constable could not legally have sold the whisky if he had seized it, and, therefore, it cannot be said that there was sufficient whereon to levy, even though the whisky was worth \$150 in places where it could properly be sold. The object of the Act is the prevention of the sale of intoxicating liquor except under the circumstances stated in the Act. It is submitted, however, that even if the constable's return was untrue the magistrate was justified in acting upon it, and in issuing the warrant of commitment. *Clarke's Mag. Man.* 270; *Reg. v. Sanderson*, 12 Ont. R. 178. The warrant being regular on its face, and the magistrate having jurisdiction to issue it, this Court will not interfere while it stands.

A. I. Trueman, in reply: The return of the constable may justify the magistrate in issuing the warrant, but on an applica-

tion for the defendant's discharge under Consol. Stat., ch. 41, the Judge may examine into and decide upon the legality of the imprisonment without regard to the constable's return.

FREDERICTON, December 19, 1893.

HANINGTON, J.:—This is an application for an order under Consol. Stat., ch. 41, for the discharge of the defendant detained on a warrant of commitment issued after failure to find distress, under The Canada Temperance Act. The defendant was convicted under that Act, and the usual warrant of distress issued, and upon the constable proceeding to execute the same the defendant pointed out to him a quantity of intoxicating liquor as her property upon which he could levy and realize the amount of the warrant, this being the only personal property she had. The officer refused to take the liquor, on the ground that it being in a county where The Canada Temperance Act was in force, he could not lawfully sell or dispose of it to realize the amount required under the warrant; and there being, therefore, no available property to satisfy it, he returned the warrant, saying that there was no sufficient distress, and on a warrant of commitment issued thereon took the defendant to gaol, which is the imprisonment complained of. Application was made to Mr. Justice Palmer for an order in the nature of a habeas corpus, who has referred it to the Court.

The points raised are: 1st. Can the return made to the warrant of distress by the officer be contested on an application for a habeas corpus, by affidavit or orally (as the hearing may be), and the fact that there was property available to satisfy the warrant shewn? 2nd. Was the property, being intoxicating liquor, available for the officer as a levy—in other words, could there be a judicial sale of intoxicating liquors in a county where The Canada Temperance Act is in force?

The first point was, I thought, substantially disposed of on the argument, and my opinion then was, and still is, that in a case like this all the necessary facts can be supplied at the

hearing. Section 6, ch. 41 of the Consol. Stat., provides that "Upon return to such order" (the order made for hearing) "the Judge may proceed to examine into and decide upon the legality of the imprisonment and make such order, etc." It must, I think, follow that in such investigations all the facts can be brought before the Judge that may become necessary or important for him to know to enable a determination as to the legality of the imprisonment. Such has been the practice. It would seem to me to entirely destroy the effectiveness of the law of habeas corpus, if the return alone of any officer, be it a true or false return, were to be held conclusive of the reasons for, and therefore of the legality of, the imprisonment.

The second point is an important one, but I think, on principle, that it must be determined in the affirmative. Its determination depends on the construction of the statute, as to whether or not it was the intention of Parliament to prevent the sale of liquor by an officer in the discharge of his duty. The provisions of the Act are in terms and effect contradictory. The words of the enacting section (Rev. Stat. Can., ch. 106, sec. 100) are: "Everyone who, by himself, his clerk, . . . exposes or keeps for sale any intoxicating liquor, shall, on summary conviction, be liable to a penalty," etc. While, on the other hand, sec. 107 provides that every offence against the second part of the Act may be prosecuted and (as amended by Act 51 Vict., ch. 34, sec. 9), the penalties and punishments therefor enforced in the manner directed by the "Act respecting summary proceedings before justices of the peace" (Rev. Stat. Can., ch. 178), sec. 62 of which provides that the penalty imposed in a case like the present is to be enforced by warrants of distress, as in forms N. 1 and N. 2, the former of which was used here. Form N. 1, after reciting the conviction, is as follows: "These are, therefore, to command you [the constable], in Her Majesty's name, forthwith to make distress of the goods and chattels of the said A.B.; and if within days next after the making of such distress, the said sums, together with the reasonable charges of taking and keeping the said distress,

are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale unto me, . . . that I may pay and apply the same as by law directed, and may render the overplus, if any, on demand, to the said A.B.; and if no such distress is found, then to certify the same unto me, that such further proceedings may be had thereon as to law appertain;" that is, the issuing of a warrant of commitment for want of distress, Form W. of 51 Vict., ch. 34, which is the warrant under which the defendant is here arrested and detained.

These substantial provisions of this Act, namely, the enacting clause and the distress warrant, are plainly inconsistent and contradictory, and the question is which shall control under cases such as this. To determine this, it is necessary to ascertain what were really the scope, grounds and intent of the statute. Was it absolutely to prevent the sale of intoxicating liquor as property in any case, or was it to prevent the sale in the ordinary traffic and business of the country? All parts of the Act must be considered and reconciled, so far as possible, to carry out the object of the Legislature. To reach the grounds and the intention of the Act, the title may become important. Here, it is in these words: "An Act respecting the traffic in intoxicating liquors," and it is to be called "The Canada Temperance Act." The words of the title declare it to relate to "traffic," and of the section to "temperance;" by which I think the object and intention of the Legislature is clearly shewn to be to control the buying and selling, or traffic in liquor, as an ordinary article of merchandise, with a view to promote temperance. The whole scope of the Act is to that end, and its provisions are adapted to carry that intention into effect.

To arrive at the intention of the Legislature in cases of inconsistent terms or doubt, reference is frequently made to repealed statutes on the same subject, as was done in *Ex parte Lugin*, 3 Pugs. 125. On doing this, we find the title to the original Act of 1878, 41 Vict., ch. 16, the same as the present

title; and the preamble of that Act would be also a means to obtain the same end; for, as stated by Bacon in his Abridgement, "Statute" I., 2, "it is in general true that the preamble of a statute is a key to open the minds of the makers as to the mischiefs which are intended to be remedied by the statute"; and Comyn's Digest, "Parliament" R. 11, says: "The preamble is a good means for collecting the intent." Here the preamble reads as follows: "Whereas, it is very desirable to promote temperance in the Dominion, and that there should be uniform legislation in all the Provinces respecting the traffic in intoxicating liquors." These words, as well as the title, would seem to indicate beyond question that the object of the Legislature was, and so far as these indicia will enable us to determine, is, to prevent or regulate traffic in intoxicating liquors in such a way as to promote temperance, not to prevent a judicial sale of property, which really is not traffic. The word "traffic" in itself includes buying as well as selling; it is defined to be "the business or employment of buying and selling," "to trade," "to buy and sell," "to exchange in traffic;" and giving these words their usual meaning, in expressing the intention of the Legislation, there seems to be no doubt that the scope of the Act is limited to traffic, and to so control it as to promote temperance. This being so, would the seizure and sale of liquors of the defendant to satisfy a penalty imposed for the infringement of this very Act tend to promote temperance, or tend to prevent the sale or keeping for sale of such liquor? In the usual course of business, this latter result is not probable, I think. If a person who wishes to transgress the law is assured that his stock of liquor is safe from seizure for penalties or other liabilities, he will have an assurance that might increase the temptation to continue his unlawful course. Again, any such exemption from seizure would enable a debtor in possession of any quantity of liquor to set his creditors at defiance in securing the payment of their debts or enforcing a judgment. All he would have to do would be to keep his stock in a county where The Canada Temperance Act is in

force (even if he did not do business in that county), as a reserve there, on which he could draw and sell at any time, thus enabling himself to do what I think the law never contemplated. This apparent contradiction in terms is not unusual in statutes. The Auctioneers' License Act (Consol. Stat., ch. 94, sec. 3), says: "Whosoever shall sell any lands or goods by auction without license and executing the bond aforesaid, shall for each act of selling be liable to a penalty of \$400"; and it has never, I believe, been contended that this applies to a sheriff or officer selling goods in discharge of his duty.

It is laid down in Comyn's Digest, "Parliament" R. 10b., that "every statute ought to be construed according to the intent of Parliament," and "not according to the letter, but according to the intent"; and "in the construction of statutes the end is to be considered." The reasons and grounds of the Legislature here being to prevent or control traffic, I think that under the canon of construction the prohibiting words of sec. 100 are limited to that object, and should not be held to prevent a judicial sale, which prohibition, in my opinion, was not contemplated by the Legislature.

There is another principle which I think would decide this in the affirmative. One part of the Act (section 100) prohibits any sale, under a penalty. Another part, for the purpose of enabling the Act to be carried out and enforced, on a conviction for the penalty, directs the officer to seize the defendant's property to pay the penalty for the breach. The property being seized, the law lays on the executive officer the duty of selling it. For the faithful discharge of that duty he is under legal liabilities, and subject to a penalty for the neglect of his duty. A statute laying a duty on an officer indemnifies him from liability for its discharge. The statute, though it prohibits the sale or keeping of the intoxicating liquors for sale, does not take away the property of anyone therein. It is still property subject to seizure by and the control of the officer, and while it is so the officer must take it if he obeys his warrant. If an obligation is on him to do so (as it is), then

the law protects him. It is a well established principle that if a statute confers a power or imposes a duty, it impliedly grants also the power of doing all such acts or employing such means as are essentially necessary for its execution. And the same principle applies in the concession of powers, privileges or property. When these are granted, everything indispensable to their exercise is impliedly granted. Maxwell on Statutes, 319. Here, a power and duty are by statute imposed on the officer; therefore, he is impliedly vested by that statute with every necessary power and authority to carry out his duty, which includes a sale of property seized under an execution or warrant, as in this case, although the words of the enacting clause in express terms prohibit any sale. Lord Tenterden, in *Halton v. Cove*, 1 B. & Ad. 558, says as follows: "On a sound construction of every Act of Parliament, I take it the words in the enacting part must be confined to that which is the plain object and general intention of the Legislature in passing the Act."

Here the plain scope of the Act, and the object and intention of the Legislature, is to prohibit, limit and control the traffic in intoxicating liquors, in which I think a judicial sale is not included, and is, therefore, lawful.

TUCK, J.:—The defendant was convicted before the police magistrate of Chatham for violation of the second part of The Canada Temperance Act, and was fined fifty dollars, with eleven dollars and fifty cents costs.

The fine and costs were not paid, and a distress warrant was issued against her. John Menzies, the constable who had charge of the warrant, certified to the magistrate that he could find no sufficient goods or chattels of Catherine Fitzpatrick whereon to levy the sums named in the warrant. Thereupon, on the twenty-seventh day of June, 1893, the magistrate issued a warrant of commitment, under which Catherine Fitzpatrick was conveyed to the common gaol of the County of Northumberland. She then made application to His Honor Mr.

Justice Palmer for an order in the nature of a habeas corpus, and the matter coming on to be heard before him, he referred it to this Court.

There is only one point to be considered.

In Mrs. Fitzpatrick's affidavit, she says that when John Menzies, a constable, informed her that he had a distress warrant against her goods and chattels, she pointed out to him as her property a cask of rye whisky, containing about thirty gallons, which, at that time and place, was worth one hundred and fifty dollars; and that this was the only property she owned; that Menzies did not levy on the cask of whisky, but went away without doing anything further.

The question to be answered is, whether or not the magistrate was justified in committing the defendant to gaol, after she had offered the constable whisky of sufficient value to satisfy the penalty and costs.

I think that the magistrate was justified in issuing his warrant of commitment, for several reasons. In the first place, there was no sufficient distress pointed out to the constable. Offering a cask of whisky to satisfy a penalty and costs has the appearance of being the latest and most ingenious method yet devised of escaping the consequences of a violation of The Canada Temperance Act. The woman knew quite well that in the County of Northumberland, where the Act is in force, the constable had no right to sell whisky, even to satisfy a distress warrant. Therefore, she might better have offered him an empty cask, worth a dollar, than one filled with whisky, which it was illegal to sell.

But there is another reason why, in my opinion, the magistrate was justified in issuing his warrant of commitment. I agree with the decision in *Reg. v. Sanderson*, 12 Ont. R. 178, that if a constable makes an untrue return he may be liable to an action, but the magistrate is justified in acting upon it, and issuing a warrant of commitment in default of sufficient distress.

I think that the defendant was rightly sent to gaol.

PALMER, J.:—I agree with the judgment of my brother Hanington.

SIR JOHN C. ALLEN, C.J., FRASER and LANDRY, JJ., took no part.

Referred to the Judge to make order accordingly.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J., C.P., AND ROSE, J., SITTING AS A
DIVISIONAL COURT.

DAVIDSON v. GARRETT.

Coroner's inquest—Coroner's court a court of record—Summoning jurors by verbal direction only—Verbal order for post-mortem examination—Justification—Proceeding with post-mortem examination before the jury is impanelled—Cr. Code sec. 568.

1. A coroner's court is a court of record, and the coroner is a judge of a court of record.
2. A coroner has power to himself summon the coroner's jury by a mere verbal direction to the jurors.
3. A post-mortem examination may be directed by the coroner, and proceeded with under such direction, before the impanelling of the jury.
4. Although the surgeon making the post-mortem examination may not be bound to do so without the coroner's written direction, yet if he proceeds on a verbal direction the latter constitutes a legal justification.

ARGUED: April 7, 1899.

DECIDED: July 11, 1899.

Motion by the defendants to set aside the verdict and judgment in favour of the plaintiff in an action tried before Meredith, J., and a jury, at Toronto, on the 3rd February, 1899, and to dismiss the action, or, in the alternative, for a new trial.

The defendants were practising physicians and surgeons, and the plaintiff alleged in his statement of claim that they, on the 8th February, 1898, without any legal authority, justification, excuse, or license, and against the will of the plaintiff,

unlawfully entered his premises in the city of Toronto, and remained there for a considerable time, although ordered off by the plaintiff, and while there did cut and mutilate the dead body of Ellen Davidson, the plaintiff's wife

The defendants justified under a direction given them by one of the coroners of the city of Toronto to make a post-mortem examination for the purpose of ascertaining the cause of death. This direction was not in writing, nor was any consent in writing or otherwise given by the County Crown Attorney, in accordance with sec. 12 (2) of the Act respecting Coroners, R.S.O. ch. 97. No notice of action was given to the defendants.

The jury found for the plaintiff with \$600 damages, and judgment was thereupon directed to be entered for the plaintiff against the defendants for the amount found by the jury with costs.

The trial Judge asked the jury whether the defendants honestly believed that all things that were necessary had taken place to authorize them to do what they did. The jury answered: "We have no means of knowing from the evidence what the defendants believed, but in our opinion we answer to the question, no."

TORONTO, April 7, 1899.

E F. B. Johnston, Q.C., for the defendants: The action is in fact for trespass to land by entering the house without license, and what was done to the body was shewn in aggravation of damages. The defendants were entitled to notice of action, having acted *bond fide* in the discharge of a public duty: *Scott v. Reburn* (1894), 25 O.R. 450. There was in fact no trespass, as the defendants entered the house by permission of a member of the family; and no action can be held to lie for what was done to the body, and no damages could be assessed therefor. The defendants were justified in what they did by the verbal instructions of the coroner, and he had authority to

give the instructions; the defendants were not notified of the withdrawal of the warrant. The finding of the jury was perverse, and the damages, at all events, were excessive.

Robinette, for the plaintiff: No notice of action was necessary, as the defendants were not performing a public duty: *Kelly v. Barton* (1895), 26 O.R. 608, 22 A.R. 522; *Cleland v. Robinson* (1862) 11 C.P. 416; *Jones v. Grace* (1889) 17 O.R. 681; *Hodgins v. Corporation of Huron and Bruce* (1866), 3 E. & A. 169. [MEREDITH, C.J.: We are in your favor on that point.]

John M. Godfrey, on the same side: Three things were necessary to give the defendants authority to enter upon the premises of the plaintiff for the purpose of making the examination: (1) A warrant for an inquest; (2) the consent of the Crown Attorney; (3) a written direction from the coroner. None of these requisites existed, and there was thus a total absence of authority. The jury gave the only answer to the question asked by the Judge which could have been given. The defendants were presumed to know the law and to know that these three things were required to authorize a lawful entry. They could not have a *bond fide* belief that everything had been done which should have been done, because there was nothing on which they could found their belief: see *Agnew v. Jobson* (1877), 47 L.J.N.S.M.C. 67; *Cook v. Leonard* (1827), 6 B. & C. 351; *Alcock v. Andrews* (1788), 2 Esp. 542; *Griffith v. Taylor* (1876), 2 C.P.D. 194; *Connors v. Darling* (1864), 23 U.C.R. 541; *Cod v. Cabe* (1876), 45 L.J.N.S.M.C. 101.

Johnston, Q.C., in reply.

TORONTO. July 11, 1899.

MEREDITH, C.J.:—The action of the plaintiff, as presented in the pleadings, at the trial, and in the argument before us, is one of trespass *quare clausum fregit*, and the cutting and mutilating of the dead body of the plaintiff's wife are alleged in aggravation of the damages which the plaintiff seeks to

recover for the alleged trespass, probably because, according to the law of England as introduced into this Province, there is no property in a dead body, and a trespass cannot be committed in respect of it.

The wife of the plaintiff had died suddenly, and a question arose as to whether the plaintiff could obtain a certificate of death so as to permit the interment of the body. The defendants, acting under a verbal direction from Dr. Johnson, a coroner for the city of Toronto, where the death occurred and the body lay, entered the house of the plaintiff for the purpose of making, and made there, a post-mortem examination of the dead body of his wife, and it is for this that the plaintiff brings his action.

It appears from the evidence—a statement of the plaintiff sworn to by one of the witnesses, and not denied by the plaintiff—that Dr. Johnson had issued a warrant to impanel a jury for the purpose of holding an inquest on the body, but that the warrant was subsequently withdrawn. It does not, however, appear when the withdrawal of the warrant took place, but it must have been after the direction was given to the defendants to hold the post-mortem, and the fact of its withdrawal was not communicated to or known by the defendants, or any of them, until after the acts of which the plaintiff complains were done.

If, in these circumstances, what the defendants did was a lawful act, the plaintiff must of course fail, for his action is based solely upon the ground that the defendants' acts were unlawful.

A coroner's court is a court of record, and the coroner is a judge of a court of record: *Thomas v. Churton* (1862), 2 B. & S. 475; *Jervis on Coroners*, 5th ed., p. 62; *Boys on Coroners*, 2nd ed., pp. 2, 208.

The powers and jurisdiction of coroners are of very ancient origin, and do not depend upon the provisions of any statute, though statutes have been passed both in England and in Canada dealing to some extent with their duties and powers. The provincial statute R.S.O. ch. 97 is one of such statutes.

I am unable to find anything which makes it essential to the constitution of the coroner's court or to the exercise by him of his judicial functions with regard to a dead body, or the holding of an inquest, that he should issue his warrant for the purpose of the inquest; that is, no doubt, the usual course taken, but there is no reason that I can see why the coroner, if he chooses to do so, may not himself impanel the jury, summoning them to attend by a verbal direction for that purpose given by himself, and, indeed, a case might arise in which such a course might be not only convenient but almost necessary. In Nova Scotia and Prince Edward Island that he may do so is provided by statutory enactment (Nova Scotia R.S. 1888, 5th ser., ch. 17, sec. 3; Prince Edward Island, 39 Vict. ch. 17, sec. 2).

If I am right in this view, whether or not Dr. Johnson had issued his warrant, Dr. Johnson having had authority to hold an inquest upon the body of the plaintiff's wife, and having determined, as he had, that it ought to and should be held, and having begun his proceedings, had, unless R.S.O. ch. 97 affects his power and authority as coroner, power to summon medical witnesses to attend the inquest and to direct them to hold a post-mortem.

It is plain, I think, that, though the ordinary course is to issue a summons to the medical witness whose attendance is required, that formality is unnecessary if the witness chooses to attend upon the verbal or other request of the coroner, and there is nothing which requires that the direction to the medical witness to hold the post-mortem should be in writing.

It is suggested that the post-mortem ought not to take place until the jury which has been impanelled has viewed the body. Referring to this question, Mr. Justice Rapallo, in *The People v. Fitzgerald* (1887), 105 N.Y., at p. 152, said that the point of law as to whether the post-mortem could be held before the coroner impanels the jury was debatable; but in *Jervis on Coroners* it is said that in all cases of sudden or violent death, and especially where it is likely that a criminal charge will be made against some person, it is desirable that a surgeon should

be called as a witness, and that it is also very desirable that he should prepare himself to give the required evidence by making a careful examination of the body, not only externally or of the supposed seat of injury, but of the different cavities and of the head, and by taking written notes of the appearances: and that if this is done before the meeting of the court, time may be saved and the trouble and inconvenience of an adjournment avoided: 5th ed., p. 30.

It seems to me that no absolute rule can be laid down on the subject, and, as far as I have been able to discover, no rule of law exists which forbids the making of the post-mortem before the impanelling of the jury takes place. The matter is one of procedure, I think, to be determined on the facts of each case by the coroner in the exercise of his discretion.

Does then the statute referred to affect the question? It is provided by sub-sec. 2 of sec. 12 as follows:

"(2) In no case shall any coroner direct a post-mortem examination to be made without the consent in writing of the County Crown Attorney unless an inquest is actually held."

This provision assumes that a coroner has jurisdiction to direct a post-mortem examination to be made without holding an inquest, and its purpose was to prevent a municipality being unnecessarily burdened with the expense of such an examination.

The term "inquest" cannot have been used in its ordinary sense. So to read it would make nonsense of the enactment. "Inquest" includes all the proceedings down to and including the requisition, and it can scarcely have been intended that a post-mortem, for the purpose of ascertaining the cause of death for the information of the coroner's court, should not take place until that question had been passed upon and the inquiry had been determined. What was intended was, I think, that the coroner should not, without the required consent, direct a post-mortem examination for the purpose of determining whether an inquest should be held, but only where he has determined to hold an

inquest and gives the direction as part of the proceedings incident to it.

If the provision is, however, to be read differently, it is in form directory, and does not, I think, render acts done by a surgeon in good faith under the direction of a coroner unlawful because the coroner has neglected to obtain the prescribed consent, where those acts would be lawful had the consent been obtained.

I come, therefore, to the conclusion that the coroner was acting within his jurisdiction in directing the defendants to hold the post-mortem, and that they had, therefore, the right to enter the house of the plaintiff where the dead body lay, for the purpose of making and to make the post-mortem examination of it which they had been directed to make, and that the plaintiff's action therefore fails.

It would be, as it seems to me, a most unsatisfactory condition of things if a surgeon who has been directed by a coroner, acting within his jurisdiction, to make a post-mortem examination of a dead body for the purposes of an inquest which the coroner in the exercise of his judicial discretion has determined to hold upon it, be answerable as a wrong-doer for what he does unless he is able to shew that the coroner has acted in strict conformity with the law in his proceedings antecedent to the giving of the direction under which he acts, where what he does would not be actionable had the coroner proceeded regularly.

If I had come to a different conclusion on the branch of the case which I have dealt with, it would have been necessary to consider whether there was evidence to go to the jury of a trespass in fact. As to that, although I have not formed a definite opinion, the inclination of my mind is against the plaintiff.

Had I been of opinion that the plaintiff is entitled to succeed, the damages are, in my opinion, excessive, and should be reduced to a practically nominal sum. The defendants acted in good faith and in the honest belief that they were dis-

Charging an important public duty. The holding of an inquest would have been proper, having regard to the circumstances attending the death of the plaintiff's wife; he himself anticipated that an inquest would or might be held. It is not pretended that the defendants acted otherwise than with a due regard to the feelings of those connected with the dead woman, or that unnecessary violence was used or any indignity offered to the body, but all that was done was done decently and in order—if the defendants had authority to make the post-mortem.

Therefore, had the conclusion been that the plaintiff was entitled to recover, the damages should have been reduced, as I have indicated, counsel having consented to our reducing them if we should think the damages were excessive.

The appeal should, in my opinion, be allowed, and the findings of the jury and the judgment entered thereon be set aside, and in lieu thereof judgment should be entered dismissing the action, all with costs to be paid by the plaintiff to the defendants.

ROSE, J.:—

It is beyond question that the coroner is a judge of a court of record. That being so, he has all the powers of such a court, and the maxim *omnia præsumunter rite et solenniter esse acta* applies; and Dr. Garrett was, I think, quite justified, and, apart from the order being a parol one, was bound to act upon the order of the coroner. I do not say how it would have been had he declined to act upon a parol order. The case of *Gosset v. Howard* (1847), 10 Q.B. 411, is an instructive case. This is referred to in Broom's *Legal Maxims*, 6th ed., at p. 907.

Unless it was necessary to have the order to make the post-mortem in writing, in order to give it validity and constitute it a justification of Dr. Garrett's act, there seems to be no question as to the order being a protection, and it being a matter within the jurisdiction of the coroner, as I shall point out, it was the duty of Dr. Garrett to assume that all the formalities had been complied with necessary to make the order effective.

An instructive article on the office of a coroner is found in the American & English Encyclopædia of Law, 2nd ed., vol. 7, sub. tit. "Coroner"; also in Bouvier's Law Dictionary, sub. tit. "Inquest," where we find that "inquest" has at least three meanings, one being "a body of men appointed by law to inquire into certain matters: as, the inquest examined into the facts connected with the alleged murder. The grand jury is sometimes called the grand inquest." Another: "The judicial inquiry itself by a jury summoned for the purpose, is called an inquest. The finding of such men, upon an investigation, is also called an inquest, or an inquisition."

In the statute R.S.O. ch. 97 the word is apparently used with different meanings. It seems to me that in sub-sec. 2 of sec. 12, where a coroner is required not to "direct a post-mortem examination to be made without the consent in writing of the County Crown Attorney, unless an inquest is actually held," the meaning with which the word is used is "inquiry," for I find in sec. 11 that the medical practitioner to whom a direction to make a post-mortem examination is permitted to be given is one summoned as a witness to attend the inquest; and to the same effect is sec. 12. It would seem, therefore, as if the intention of the Legislature was that a jury must be summoned and a date fixed for the beginning of the inquiry or inquest, and then a medical witness summoned to attend such inquiry may be directed to make the post-mortem. In sec. 12 the words are: "The coroner may at any time before the termination of the inquest direct a post-mortem examination." The opening words of sec. 11 are "where upon the summoning or holding of a coroner's inquest the coroner finds," etc. If, therefore, the sole powers given to the coroner were those conferred upon him by that Act, and if he were an officer of an inferior court, it may be that it would be necessary not only to fix the day for the hearing, but to formally summon the medical practitioner as a witness, and together with the summons give direction for the holding of the inquest; and it may be that, in order to subject the medical practitioner to the penalty

provided by the statute (sec. 15), the formalities of the statute must be complied with. Here, however, it is clear, both from the statement of the plaintiff and from the evidence of Dr. Garrett, uncontradicted, that a warrant had been issued, and therefore a day had been appointed, and that the coroner had told Dr. Garrett to perform a post-mortem examination. What Dr. Garrett said, in effect, was this: that the coroner called him up by telephone late in the day and told him he had been and seen the body and that a post-mortem would be necessary, and gave him instructions to make the post-mortem, and that he made the post-mortem in pursuance of such instructions. He further said that the coroner (Dr. Johnson) had telephoned him that he had issued a warrant for the inquest, and when the coroner telephoned him that he had issued a warrant for the inquest and instructed him to go and perform a post-mortem, he thought he had sufficient authority.

If a literal compliance with the statute were necessary, one can see how it would be almost impossible to prevent disaster, and having regard to the duties and powers of the coroner at common law and under the statute, I agree that what here took place was a sufficient warrant or authority to Dr. Garrett to perform the post-mortem examination.

I also agree that the damages were excessive, and must, if the finding in favour of the plaintiff had stood, have been reduced to a nominal sum, for the reasons given by the learned Chief Justice.

I have given the question of whether there was a trespass in fact much consideration, and I also find my mind going against the plaintiff on this question, although I have not reached a definite conclusion.

I agree that the appeal should be allowed and the action dismissed with costs.

Action dismissed.

[COURT OF QUEEN'S BENCH, QUEBEC.]

(CRIMINAL SIDE.)

BEFORE THE HON. HENRI T. TASCHEREAU, ONE OF THE JUDGES OF THE
SUPERIOR COURT FOR THE PROVINCE OF QUEBEC.

THE QUEEN v. JOHN DELISLE.

Inter-colonial extradition—Fugitive Offenders' Act, R.S.O., ch. 143—Special power on habeas corpus to review the evidence—Certiorari in aid unnecessary—Discretionary power of Superior Court to order discharge—Independent finding that prima facie case made out—Manslaughter—Ship collision—Negligence—Reckless disregard of human life as distinguished from mere error of judgment—Cr. Code secs. 220, 230.

1. The effect of secs. 9 and 10 of the Fugitive Offenders' Act, R.S.C. ch. 143, is to confer a special power upon the Court hearing a habeas corpus application thereunder to review the evidence upon which the commitment for inter-colonial extradition is founded.
2. No certiorari is required in aid of the writ of habeas corpus in cases under the Fugitive Offenders' Act, because the effect of secs. 10 and 17 thereof is to put the Court in possession of the whole record and evidence.
3. Extradition from Canada to another British possession will not be confirmed on habeas corpus unless a prima facie case of guilt is made out to the satisfaction of the Superior Court to which the accused makes application for his discharge, irrespective of the decision of the committing magistrate.
4. The enquiry under sec. 10 of the Fugitive Offenders' Act and the power to discharge the accused in trivial cases, etc. is practically unlimited, and the Court on habeas corpus may in the exercise of its discretion order a discharge for any reason which appears to it to be satisfactory.
5. It is not necessary to order inter-colonial extradition for the purpose of having a jury determine the controverted facts, if a prima facie case is not made out, and if, in consequence, an acquittal might at a trial be properly directed by the trial Judge.
6. On a charge of manslaughter against the master of a ship in respect of a collision resulting in loss of life, such recklessness must appear as will amount to a wilful attempt upon the lives of people in putting them to danger, and not merely an error of judgment.

DECIDED: December 7, 1896.

The accused had been arrested on a warrant issued in Newfoundland and endorsed by two Judges of the Court of Queen's Bench for Quebec under the Fugitive Offenders Act, the offence charged being that of manslaughter laid in respect of the alleged criminal negligence of the accused in the management of the steamer "Tiber," resulting in a collision with the schooner "Maggie" on the high seas.

The Judge of the Sessions at Montreal committed him for surrender to the Colony of Newfoundland, whereupon the accused obtained a writ of habeas corpus from the Hon. H. T. Taschereau, a Judge of the Superior Court, acting in the absence from Montreal of the Judges of the Queen's Bench, and with the like powers as a Judge of that Court. The following return was made to the writ:—

PROVINCE OF QUEBEC } I, Chs. A. Vallée, Keeper of Her
District of Montreal. } Majesty's Common Gaol in and for the
City and District of Montreal in the Province of Quebec afore-
said, do hereby certify and return to our Sovereign Lady the
Queen that before the coming of the annexed Writ to me
directed to wit on the second day of December the body of
John Delisle therein named committed into the said Gaol of
our said Lady the Queen under my custody by virtue of this
Warrant under the hand and seal of M. C. Desnoyers, Esquire,
Judge of the Sessions of the Peace which said Warrant read in
the words following to wit:

“ Warrant of Committal.

Canada.

Province of Quebec; District of Montreal.

City of Montreal. Magistrate's Office.

To all or any of the Constables or other Peace Officers in the District of Montreal, and to the Keeper of the Common Gaol at the City of Montreal, in the said District of Montreal.

Whereas, John Delisle, of the Parish of St. Johns, in the Island of Orleans, in the District of Quebec, Master of the Canadian Registered sea steamer “Tiber” was this day charged before me, M. C. Desnoyers, Esquire, Judge of the Sessions of the Peace, acting in and for the District of Montreal on a warrant signed and sealed by James Gerve Conroy, Esquire, Stipendiary Magistrate and Justice of the Peace for Newfoundland, duly authenticated by Sir Robert Harley Murray, Governor of Newfoundland, endorsed by the Honourable R. N. Hall, of the Court of Queen's Bench, and the Honourable J. J.

Curran, of the Superior Court of the Province of Quebec, and brought to me by Mr. John R. McGowen, Chief of the Constabulary force of Newfoundland, that he, the said John Delisle, on the sixth day of November last (1896), on the high seas, out of the body of any District in the Island of Newfoundland and within the Jurisdiction of the Supreme Court of Newfoundland in Admiralty, did feloniously and unlawfully kill and slay William Diamond and twelve others, by his criminal negligence in causing the collision at sea between the steamship "Tiber" and the schooner "Maggie."

And whereas I have this day in virtue of the Fugitive Offenders Act committed, and do hereby commit the said John Delisle to prison on the foregoing charge to await his return to the City of St. Johns, in Newfoundland aforesaid.

Whereas I then and there informed the said John Delisle that he would not be surrendered until after the expiration of fifteen days, and that he had a right to apply for a writ of habeas corpus or other like process.

These are, therefore, to command you, the said Constables or Peace Officers, or any of you to take the said John Delisle, and him to safely convey to the Common Gaol at the City of Montreal aforesaid, and there to deliver him to the Keeper thereon together with this precept: And I do hereby command you, the said Keeper of the said Common Gaol to receive the said John Delisle into your custody, in the said Common Gaol; and there safely to keep him until he shall be thence delivered by the due course of law. Given under my hand and seal this second day of December in the year of Our Lord one thousand eight hundred and ninety-six, at the said City of Montreal in the District aforesaid. M. C. Desnoyers, Judge of the Sessions of the Peace."

And that this was the cause and the only cause of the Caption Commitment and detention of the said John Delisle in Her Majesty's Gaol aforesaid, the body of which said John Delisle I have here now as by the said Writ it is commanded me Attested at the City of Montreal in the said District of Montreal in the said Province of Quebec, this seventh day of

December in the fifty-eighth year of Her Majesty's Reign and in the year of Our Lord one thousand eight hundred and ninety-six. C. A. Vallée, Gaoler.

H. C. Saint-Pierre, Q.C., for the accused :—To constitute the offence of manslaughter in such cases there must be proof of "gross negligence" or "wilful misconduct." See *Rex v. Allen & Clark*, and *Rex v. Green*, 7 C. & P. 153, 156.

A mere error of judgment would not be sufficient to constitute the offence. In the two above cases, the wrong doing reproached to the captains in charge of certain steamers was that they had neglected to put an officer on the look-out on the forward part of the steamer. In each instance the case was stopped and a direction to acquit was given by the presiding Judge.

In our case every officer was at his post and every one did his best, first, to avoid the collision, and after the collision to save life.

Had the accused the right to examine witnesses before the magistrate holding preliminary examination? If so, how far is that evidence available in favour of the accused at this stage of the proceedings?

Section 7 of the Fugitive Offenders Act says "that the magistrate shall hear the case in the same manner and have the same jurisdiction and power as if the fugitive was charged with an offence committed within his jurisdiction."

By section 593 of our Code it is provided that "after the proceedings required by section 591 are completed, the accused shall be asked if he wishes to call witnesses. 20. Every witness called by the accused who testifies to any fact relevant to the case shall be heard."

Mr. Greaves, commenting upon the law as it existed in England in 1855, says :—

"It is difficult to imagine a greater act of injustice than that a man should be committed or bound over in a case where he has evidence so clear and conclusive that no person for a moment doubt his innocence."

(See Crankshaw's Code, page 560). Article 594 provides for the discharge of the accused when the evidence is insufficient.

"When all the witnesses on the part of the prosecution and the accused have been heard, the justice shall, if upon the whole of the evidence he is of the opinion that no sufficient case is made out to put the accused upon his trial, discharge him."

See Crankshaw's Code, p. 561.

It is objected that the Code having been in force at a date subsequent to the Fugitive Offenders Act, the articles cited above cannot apply to a case like the present one, and therefore that the magistrate had no authority to admit any evidence for the defence. This objection cannot stand for a moment. 1o. Laws on procedure are of their nature applicable even to offences created before they were enacted, and 2o. Article 981 of the Code has a special disposition on this point which can leave no doubt as to the applicability of articles 593, 594 of the Code.

The next question is: How far is that evidence for the defence to be inquired into by the magistrate?

This point has been discussed by many commentators, and is to-day well understood.

Saunders in his book *Practice of Magistrate Courts*, 5th ed., by Dr. James A. Foot, says at page 227: "There are, however, many cases of *prima facie* guilt which the accused, by evidence, may be enabled to explain as to clear up at once the imputation resting upon him." At page 231 the author puts the rule very clearly: "Justices in the performance of this portion of their duties will not balance the evidence and decide according as it preponderates, for this would, in fact, be taking upon themselves the functions of jury and be trying the case; but they will ask themselves whether or not the evidence as it stands makes out a strong or probable, or even conflicting case of guilt, in any of which cases they will do right in committing the party to trial. If, however, from the weakness of the evidence the unworthiness of the witnesses or the conclusive proof of innocence produced on the part of the prisoner

they feel that the case is not sustained, and that if they committed for trial a verdict of acquittal must be the necessary consequence, they will at once discharge the accused and so put an end to the enquiry so far as they are themselves concerned."

The jurisprudence which prevails in England is given as follows in Mr. Crankshaw's Code after Article 594: "But if the prisoner's witnesses contradict those of the prosecution in material points the case would then be a proper one to be sent to the jury to ascertain and decide which of the two conflicting statements is the truth."

In the present case there is but one conflicting statement between the witnesses. Captain Blundon says: "I shewed my green light to the steamer during the whole of my course." On the other hand the witnesses for the defence, corroborated by witnesses for the prosecution, say: "The "Maggie" was coming right ahead and shewed both her red and green lights," but this conflict of evidence is not material in this case, for, as we have shewn above, if the second version is true, we have it clearly shewn that Captain Delisle was right in the course he followed, whilst if the version of Captain Blundon be the right one, Captain Delisle may have been guilty of an error of judgment, but not of any gross or criminal negligence.

It is not sufficient in order to justify the sending of the accused for trial that there should be a conflict of evidence, but it must be apparent that one of the conflicting versions, if believed by the jury, will necessarily prove fatal to the accused, otherwise there would be no reason to justify a trial.

The evidence adduced on behalf of the defence here is chiefly explanatory and is of a character to dispel the wrong impression which might be produced at first sight. Let us illustrate this affirmation by an example: Two men are seen driving furiously into a crowd where they knock down a man and kill him. The first impression is that through reckless driving they have committed either murder or manslaughter, but if they are allowed to explain that their horse had taken a fright and was running away in a mad and blind stampede in

spite of all their efforts, then all appearance of criminality will at once be dispelled.

Our case presents analogous features : Captain Delisle may have acted under an erroneous impression in inclining his course to the right, but his explanation, corroborated by his officers, makes it plain that he was acting with the best possible intention, to do for the best in order to avoid a collision, and then all appearances of guilt disappear and his innocence is made manifest.

Can the facts be inquired into under the present writ of habeas corpus ?

There can be no doubt whatever on this point. Sections 7 and 10 of the Act are clearly remedial of the unfavourable decision arrived at by the committing magistrate.

The case of *Lamirande*, which is a leading case on the subject, has long since settled this point. (See 10 L.C. Jurist, page 280).

It has been stated on behalf of the Government of Newfoundland that a much stronger case might be made out of the prosecution if the accused was surrendered to the authorities at St. John and that we must presume such to be the case. A proposition of this sort cannot be entertained.

This case is presumed to have been made out as fully as it could be made, as indeed it was the duty of the authorities at St. John to make it. No other presumption can legitimately be raised.

The learned magistrate has given as one of his chief reasons to justify a commitment, the fact that Captain Delisle had not slackened his speed, nor reversed his engine soon enough. This might affect his civil responsibility as evidence of want of skill—see Article 1053 of Civil Code—but cannot constitute him a criminal, if it be shewn that at that time he was clearly acting in good faith and doing his best to avert a collision.

Peers Davidson, for the Colony of Newfoundland, contra :—
The Merchant Shipping Act, 1894 (Imperial) (to be found in

Federal Can. Statutes, 1895), is applicable to the steamship "Tiber"—C.C. 2355—and captain's deposition. Section 418 provides for the making of regulations for the prevention of collisions.

The following are regulations enacted thereunder and admitted in Captain Delisle's deposition, pp. 26 et seq., for greater convenience :—

"Art. 17. If two ships, one of which is a sailing vessel and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship."

"Art. 18. Every steamship when approaching another ship so as to involve risk of collision, shall slacken speed or stop or reverse if necessary."

"Art. 24. Nothing in these rules shall exonerate any ship or the owner or master or crew thereof for the consequences of any neglect to carry lights, or signals, or of any neglect to keep a proper lookout, or the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

There is ample evidence that the defendant is *prima facie* guilty of a breach of all three rules. As respects the first, the proof of the collision is sufficient. As respects the second, instead of slackening speed he actually doubled his and he only reversed about thirty-five seconds before the collision. Every master must be presumed to know of "a risk of collision" sooner than that. As respects the third, there is *prima facie* proof that he did not keep a proper lookout forward, who might have heard the shouts, and that in a narrow channel like the one in question, meeting two sailing ships as he did, he did not take ordinary precaution.

Moreover the law, The Merchant Shipping Act of 1894, raises a legal presumption of the criminal guilt of the defendant which leaves Your Honour no choice.

Section 419, paragraphs 2, 3 and 4, read as follows :—

"(2.) If an infringement of the collision regulations is caused by a wilful default of the master or owner of the ship, that master or owner shall, in respect of each offence, be guilty of misdemeanour.

"(3.) If any damage to the person or property arises from the non-observance by any ship of any of the collision regulations, the damage shall be deemed to have been occasioned by the wilful default of the person in charge of the deck of the ship at the time, unless it is shewn to the satisfaction of the Court that the circumstances of the case made a departure from the regulation necessary.

"(4.) Where in a case of collision it is proved to the Court before whom the case is tried, that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

The fact that The Merchant Shipping Act thus makes disobedience of these rules a "misdemeanour" renders the taking of life as a consequence thereof "manslaughter."

"There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief, and the party committing them and causing death will be guilty of manslaughter: 1 Russell, Crimes and Misdemeanours, p. 812 (5th ed.).

Culpable homicide not amounting to murder is manslaughter: Cr. Code, sec. 230.

"If, however, in doing the unlawful act or omitting to perform or observe the legal duty, one kills another, not meaning to kill anyone, it will in general be manslaughter:" Crankshaw Cr. Code, p. 157.

"What is the duty of a master? It is to use vigilance and care to prevent collision:" Flander's Maritime Law, p. 289, No. 350.

No vessel, especially a steamer, should unnecessarily incur the probability of a collision Ibid. No. 368.

"Negligent navigation of a vessel on the River Thames by which a skiff was run down and a man in it killed, creates criminal liability:" *R. v. Taylor*, 9 C. & P. 672.

"If there be sufficient light and the captain of the steamer is either at the helm, or in a situation to be giving the command and does that which causes the injury, he is guilty of manslaughter:" *R. v. Green*, 7 C. & P. 156.

It is not necessary that the bodies should be found. The corpus delicti is not always essential. See 1 Russell, Crimes and Misdemeanours, No. 567.

Under sec. 684 of The Merchant Shipping Act there can be no question as to the jurisdiction of the Newfoundland Government. In any event that could not be enquired into here.

The Criminal Law of England extends to all offences on British ships, either by British subjects or by foreigners, either on high seas or in foreign harbours. See Stephens' Digest of Cr. Proc., pp. 1 and 2.

MONTREAL, December 7, 1896.

TASCHEREAU, J. :—

On the third instant, at the instance of the accused, I ordered a writ of habeas corpus to issue in this case, under the operation of The Fugitive Offenders Act, Revised Statutes of Canada, ch. 143.

The writ was returned before me on the same day, and merits ably argued by eminent counsel respectively representing the Crown, the Government of Newfoundland and the accused.

The accused had been committed on the preceding day by M. C. Desnoyers, Esq., Judge of the Sessions of the Peace, and ordered to be surrendered to the authorities of Newfoundland, for trial, under the above statute; the charge being at the instance of Sir William Whiteway, Attorney-General of Newfoundland, and to the following effect: that he (John Delisle),

on the 6th day of November last, on the high seas, out of the body of any district in the island of Newfoundland, and within the jurisdiction of the Supreme Court of Newfoundland in Admiralty, did feloniously kill and slay William Diamond and twelve other persons by his criminal negligence in causing a collision at sea between his steamer "Tiber" and the schooner "Maggie."

The accused having been arrested upon the arrival of his steamer in this Province, was brought to Montreal before the Judge of the Sessions who investigated the charge under sec. 7 of the above Act. The case for the prosecution consisted of the testimony of several witnesses examined at St. Johns, Newfoundland, on the 7th November, and also of other witnesses examined here. The magistrate in Canada having the same jurisdiction and powers, as nearly as may be, in such cases, as if the accused was charged with an offence committed within his jurisdiction, Mr. Desnoyers very properly allowed the accused to give his own testimony and to produce several witnesses in support of his defence (Criminal Code, arts. 593 and 594).

Taking all this evidence into consideration, the magistrate came to the conclusion that it raised a probable presumption that the accused did commit the offence charged, and felt it his duty to order the commitment and surrender.

This order I am now called upon to revise on habeas corpus under secs. 7 and 10 of the aforesaid Act.

The accused alleges in his petition that he is innocent of the charge laid against him and should be at once set at liberty for the following reasons:—

1. Because neither the commitment nor the demand for the surrender of the petitioner are in any way justified by the evidence adduced.

2. Because said evidence shews that no blame, not even of the most remote character, can be imputed to the petitioner.

3. Because, assuming that the petitioner might have been guilty of an error of judgment, which at best could be the most damaging construction put upon his conduct as captain of the

steamer "Tiber" at the time of the collision, not one single word of evidence was adduced to shew that he was ever guilty of gross neglect, without which no criminal presumption of guilt can arise.

4. Because all the proceedings in this cause are irregular, null and void.

The learned counsel for the accused, at the argument, abandoned the fourth and last ground as unfounded.

As to the other reasons they may all be condensed into one, namely, "no offence was disclosed." The lawyers representing the Crown here, and the Newfoundland Government, respectively, have strongly contended that the powers of the Judge of a Superior Court, under the Fugitive Offenders Act, were limited, by sec. 10, to the decision of two questions only, namely:—1. Is the case of a trivial nature? 2. Is the application for return or surrender made in good faith? Further than answering these questions, they say, the Judge cannot proceed, the Act not intending that the habeas corpus should be an appeal from the whole case, or a review from the discretionary power exercised by the magistrate.

Sec. 10 reads as follows:—"Whenever it is made to appear to the Court that, by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith, in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such Court may discharge the fugitive either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the Court seems just."

Is this section absolutely remedial, or is the remedy to be applied only when the offence is of a trivial nature, or when the application for return is not made in good faith, as con-

tended by the Crown prosecutor and by the Newfoundland Government?

It seems clear, in any event, that the Court is empowered, in cases like the present one, to review the facts constituting the grounds of the commitment, since the very fact of inquiring into the circumstances as to whether the case is or is not a trivial one, or whether the application is made in good or in bad faith, or in the interests of justice, would make it an imperative duty upon the Court or Judge to look into the evidence, and examine all the circumstances of the case. Otherwise, the performance of the duty imposed upon the Court or Judge when examining these matters on habeas corpus would become an absolute impossibility. Moreover, sec. 17 of the same Act, which is clearly applicable to all proceedings under the Act (including habeas corpus), has the following enactment:—"Depositions, whether taken in the absence of the fugitive or otherwise, and copies thereof, and official certificates of or judicial proceedings stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act." Under this section all the evidence and all the papers composing the record in the Court below, have been placed before me, by common consent, and argued upon.

In the absence of secs. 10 and 17 a writ of certiorari, directed to the committing magistrate, would have been necessary (in addition to the writ of habeas corpus) to return the proceedings and evidence into the Court above (Paley, 6th ed., pp. 421, 422). But no certiorari is required here, because, by the special law under which we are acting, the Court is at once put in possession of the whole record and evidence.

In ordinary cases of habeas corpus at common law, the commitment alone is examined, and sometimes the conviction also is brought before the Court for the purpose of defeating the commitment, and in such ordinary cases the jurisdiction of the inferior Court, and the existence of an offence, apparent upon the face of the commitment or of the conviction, are alone considered for the protection of the subject's liberty. How-

ever, an esteemed author (Spelling Extraordinary Reliefs, vol. 2, No. 1214) takes a broader view of the general powers of the Court on habeas corpus, and says, after stating what is the rule and usage in ordinary cases:—"Appellate Courts and those vested by law with revisory and corrective powers over the Court or officer commanding the imprisonment, and also with jurisdiction over the offence or subject-matter of the commitment, may go further and review the facts constituting the grounds of the commitment."

However extensive may be our powers in the matter, generally, I would not be prepared to say that in preliminary investigations taken before a magistrate under articles 590 and following of the Criminal Code, and when the accused is committed under article 596 pending his trial, a Queen's Bench or a Superior Court Judge would act wisely, except in very extreme cases, when appealed to on habeas corpus by substituting his own discretion to that exercised by the magistrate who found a *prima facie* case. With the benefit of bail always available, and with the guarantee of a new examination of the case by a Grand Jury and of a fair trial afterwards, the accused has nothing to fear from the regular and normal course of justice in his own Province.

But when the accused is to be surrendered either to a foreign country or to another part of Her Majesty's possessions the liberty of the subject and his rights and privileges demand additional safeguards which alone a special statute, as the Extradition Act or the Fugitive Offenders Act, can afford by special and extraordinary provisions. Section 10 of the last mentioned Act contains, in matters affecting fugitive offenders, such special and extraordinary provisions, and in order the better to protect the liberty of the subject and prevent his unjust surrender to another government it has given to the Superior Courts of the land vast powers of appreciation and discretion, and to Her Majesty's writ of habeas corpus a very wide and almost unlimited scope, not intended, perhaps, by common law alone.

These special and extraordinary enactments, which have their *raison d'être* in the very nature of things, must be liberally construed, being all in favour of liberty, and not in a narrow nor exclusive spirit, which would tend to destroy the object in view.

Here, by sec. 10, the presiding Judge on habeas corpus has to enquire:—1. Whether the case is a trivial one or not (N. B. —The case, not the charge. The gravamen of the charge may be most serious, yet the case prove to be a trivial one after the evidence taken). 2. Whether the application for the return of the fugitive is made in good or bad faith. 3. Whether it is made in the interests of justice. 4. Whether otherwise (in the French version, *pour d'autres raisons*), and having regard to all the circumstances of the case, the order for surrender should be given at all or until the expiration of a certain period.

And, thereupon, he may order:—1. The unconditional or absolute discharge of the accused. 2. His discharge on bail. 3. That he shall not be surrendered until after the expiration of a certain period. 4. Or the Judge may make such other order as to the Court seems just.

The order being based upon the enquiry, and both the enquiry and the powers of the Judge as regards the order being practically and literally unlimited, it follows that any of the orders mentioned in the section, and any order whatever, may be given for any of the several reasons also therein mentioned or for any reason whatever.

The underlying principle of such legislation is the same which governs in extradition matters (Revised Statutes of Canada, ch. 142). Our Government will not surrender to a foreign State, however friendly, any person being in Canada and accused of a crime committed in that foreign State, without having first ascertained, by the proceedings and findings of the highest Courts of Canada, that such a crime has really been committed by that person.

Likewise, Canada will not surrender to any other Government of Her Majesty's possessions any criminal fugitive without such clear evidence of guilt made and controlled under the authority of our Superior Courts.

The powers of the Court, as defined by sec. 10 of The Fugitive Offenders' Act, are not so clearly determined in extradition matters, no similar section being found in the Extradition Act. However, in the celebrated *Lamirande case* in extradition (10 L.C.⁹ Jurist, p. 280), the jurisdiction of the Court, on habeas corpus, to review the whole evidence taken before the committing magistrate and to arrive at a contrary decision as regards the guilt of the accused was not even disputed by the Crown and by the French Government, then applying for extradition, and it was fully exercised by the presiding Judge (Hon. L. T. Drummond).

Being wholly convinced that I am presently vested with such vast powers of appreciation and discretion, and with such absolute jurisdiction, and being unable to adopt the reasoning of the learned counsel for the prosecuting government, and the restricted interpretation given by him to sec. 10 of the Act, I must now enquire into all the facts and circumstances of the case, and form my opinion upon such, irrespective of the decision of the committing magistrate. The necessary order, on the present writ, will follow as a consequence.

I must at once eliminate from the controversy the question of the good or bad faith of the prosecuting government. There is nothing in the record, and nothing in the petition for habeas corpus, to impugn the good faith of the Newfoundland authorities.

The steamer "Tiber" left St. Johns, Newfoundland, on the 6th November, 1896, for Montreal, at 6.45 p.m., the accused being in command as captain. The harbour of St. John is protected from the sea and from the strong winds by a passage called "The Narrows," stretching between high and precipitous cliffs.

The steamer was piloted through "The Narrows" by Richard Vinicombe, a licensed pilot. Two lighthouses are erected in the town to point to a straight course in the middle of "The Narrows." Steamers entering or leaving the harbour are expected to follow that straight line, provided no obstacle is in their way. Vinicombe followed that course until he left the steamer at 7.05 p.m. The steamer was then about $1\frac{1}{2}$ nautical cable lengths (900 feet) from the outside entrance of "The Narrows." Captain Delisle, who,* according to the evidence, is an old mariner, sober, careful and skilful, and very familiar with the harbour of St. John, which he visits with his ship several times a year, and with "The Narrows," then took charge of his own steamer. Just about the time the pilot left the captain sighted lights at sea, outside of "The Narrows," at a distance of $3\frac{1}{2}$ or 4 cable lengths (2100 to 2400 feet). These were the lights of the "Maggie" and the "Treasure," two schooners coming from the north and preparing to enter the channel. Green lights were first seen, as the schooners showed then their starboard or right sides, not having yet turned in to take the channel. But a few seconds later both the green (starboard or right) and the red (port or left) lights were seen, proving to the captain that the two ships or schooners were coming right in the path of his own steamer. The "Maggie" was ahead, and a little south of the straight line above mentioned. The "Treasure" was a little behind, but sailing north of same line. Seeing two vessels or schooners coming ahead, both close to the chart line, Captain Delisle at once directed his course to the south to clear the incoming vessels, who seemed to follow the middle of the channel, and when abreast of Port Amherst light (south entrance of Narrows), he rang "full speed ahead," as he was meeting a sea setting in, and in order, as he says, to have good steering way on his ship, which was light and the propeller racing somewhat. At that moment, according to the captain's version (confirmed by his crew), both schooners were keeping the same course and shewing their red and green lights, but a

few seconds after the order "full speed ahead" (5 or 6 miles an hour) had been given, Captain Delisle noticed that the "Maggie's" red light suddenly disappeared, and that she had altered her course to the south. He then rang "hard aport," and seeing that the "Maggie" was trying to cross his bow he reversed his engines full speed astern. But it was unfortunately too late, the "Maggie" had persisted in crossing the "Tiber's" bow, and the collision occurred, the schooner being struck at starboard side and sinking in a few minutes, with thirteen of her crew. The "Tiber" remained on the spot for two and a half or three hours after the accident, and her captain and crew did their best to save lives; ten lives only (out of 23) were saved, seven by the "Tiber's" boat and three by another schooner, supposed by the captain of the "Maggie" to be the "Annie Syme," but which proved to be the "Treasure."

As was to be expected, two versions are given. The persons who were on board of the "Maggie" deny that she changed her course suddenly to the south just before the accident. They say she had followed that course from the moment the steamer had been sighted. Captain Delisle and his crew give the contrary version, and swear as above stated.

Be it as it may, it is certain that the other schooner, the "Treasure," far from attempting to take the south side of the channel, always kept to the north, and so agreed with the view taken by the "Tiber's" crew that the steamer should go south, and the schooners north. A glance on the chart produced at enquête sufficed to convince me that taking the respective positions of the steamer and schooners when they sighted each other, and the distances to be crossed, it stood to reason and common sense that Captain Delisle's opinion and action in going south were alone commendable, and that the "Maggie" should have imitated the "Treasure" in her course. The wind was favourable to the direction taken by the "Treasure, the weather was fair and the night clear.

Far from a *prima facie* case of guilt being made out against the accused I am decidedly of opinion, after a careful perusal

of the whole enquête, that his course was the right one, that the weight of evidence is clearly on his side to the effect that the "Maggie's" sudden change of direction is incomprehensible and was alone the cause of the collision, and that when the accident, though the latter's fault, became inevitable, the accused did all his best and could not be blamed even in a civil action.

But we are now dealing with a criminal case and in a criminal prosecution for manslaughter, more must be shewn than a mere error of judgment (supposing one to have been committed here). Gross neglect must be shewn. Such recklessness must appear as will amount to a wilful attempt upon the lives of people, when the latter are put to danger in consequence of the acts of the accused (Harris, pp. 180, 181, 183, 187). Absence of all unlawful or malicious intent or state of mind excludes criminal responsibility in cases of accident. See leading cases of *Rex v. Allen* and *Rex v. Green* (7 Carrington & Payne's Reports, pp. 153 and 156). In both these cases, and acting under this principle, and upon the distinction to be drawn between civil and criminal responsibility, the Judges directed acquittals.

The committing magistrate, in his carefully prepared notes, says that the controverted facts in this case can only be adjudicated on by a jury. I say: The action of the jury becomes unnecessary if, taking only the version of the prosecution, no manslaughter exists in law. It is exactly the case here. It is needless to add that taking also into consideration the evidence for the defence, which explained away, in a perfectly satisfactory manner, all that which may have remained uncertain or even damaging to the accused, and following the principles laid down by criminal authors and by jurisprudence, I would have directed an acquittal, if presiding at a trial, in favour of the accused.

No *prima facie* case being made out by the preliminary examination in this case, no offence being disclosed by the evidence, the case (as made out) being trivial, in the words of the statute, and it not being in the interests of justice that the accused should be subjected to a trial in another colony of the

British Empire, which would inevitably result in an acquittal if a fair trial were given, I have no hesitation whatever in giving the necessary order for his immediate, absolute and unconditional release and discharge from custody.

Order for discharge.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

THE KING v. SPICER.

Bail—Homicide—Self-defence—Charge of manslaughter—Committal for trial—Crown's claim of ability to prove murder—Cr. Code sec. 604.

1. Where a prisoner committed for trial on a charge of manslaughter would ordinarily be admitted to bail, bail will not be refused because the Crown prosecutor swears to a belief that he can prove the offence to have been murder.

ARGUED : December 17, 1901.

DECIDED : December 18, 1901.

Motion, on the return of a summons for bail made in Chambers by Townshend, J., for an order to admit the above named defendant James Spicer to bail, he being a prisoner in the county jail at Amherst, in the county of Cumberland, under a justices' warrant of commitment for safe custody charging him for that he "did on the 30th day of November A.D. 1901, shoot and kill John Spicer at a place near Fisherman's Cove, so called, in the county of Cumberland."

At the preliminary examination before the committing justices, two witnesses only for the Crown were examined, the defendant himself offering no evidence and making no statement, before the justices in answer to the statutory caution.

The said evidence for the Crown was as follows:—

"John D. Gass on his oath saith:

"I know the accused James Spicer. I knew John Spicer the deceased. I saw the accused the 30th day of November.

He came into my door yard as near as I can tell about three or four o'clock in the afternoon ; this is where I live. He told me he wanted me to bring my team on his road (the accused's), and bring out the body of John Spicer, for he had shot him. He also said he would have others there to help me. I think I said something to him. He said he was under the tree when he shot him. I do not remember whether he said he was killed or not. He came to my house on horseback and remained but a short time. He appeared to be about the same as he generally does. He rode away for other parties. I took my team and drove in his road to where I expected to find Mr. Spicer, and waited until the accused came. He showed me where the body of the deceased John Spicer was. I found it about one hundred yards to a tree on a small road swamped out. I found the deceased there dead. The body was lying on the back. The body was near the top of the tree ; the head and part of the body were under the tree. The feet were from the tree. The feet were lying about cross, pointing to the road. I came to the left side of the body first. The swamp road was leading eastwardly. I did not notice whether the body was cold or not. It was not stiff. He had a pair of heavy shoes on. There was an axe standing on its end about far enough from the body that he could reach, I think. It was standing near this tree. In bringing out the body we found on him (the deceased) a belt and a knife on him. The knife was in the sheath when we found him. It was not a very thick growth of wood where the body was lying ; the place was quite open in some places. The accused and I put the body in the waggon. The accused did not go with me after we put it in the waggon. I drove it to Dr. Fillmore, as I expected he was the coroner. I then took the remains to A. W. Atkinson, J.R., and he took charge of it. I then went home. The body I found was the body of John Spicer, Senior, in the county of Cumberland, where the body was found."

Cross-examined :

"I cannot say whether the accused said to me when he came to me, "Come and bring out the body." I think he used the word body. The cap was not on his head when I approached the body. He had two single mittens on each hand. The top of the tree was looking to the west. The feet were lying at about right angles with the tree. I cannot say what kept the axe up. I do not know who owns the land where the body lay. The accused told me he shot the deceased in self-defence. The axe was to the right of the deceased."

Re-examined by Mr. McKenna :

"The head of the body was towards the south, and the feet to the north."

"F. A. Rand on his oath saith :

"I am the coroner for the county of Cumberland. On the 1st day of December, 1901, I held an inquest on the body of John Spicer, deceased. I found on the left side of the body some wounds just over the region of the heart, and in the left arm above the elbow near the shoulder. There were a number of separate wounds. I cannot say the wounds I saw on the body caused death. The wounds over the region of the heart penetrated it, I believe. Were made by small partridge shot. I found some of the shot, and picked one out of the arm—the outside of the arm. They passed through from the inner side to the outer side of the arm. The wounds were in a circle of three inches radius, of three inches from the centre of the wound. The shot entered slanting ways not vertically. The shot scattered about six inches apart. I think three inches from the centre would about cover this mark. The shots appeared to be fired about level with the wound. I sent the report of the inquest to the Prothonotary. No autopsy was held."

Cross-examined :

"I will not say anything about the shot being found above or below the wound."

The Crown, on this application, read the affidavit of the Hon. W. T. Pipes, the Attorney-General's agent at Amherst, who deposed that he believed he could prove on the prisoner's trial that the said homicide for which the said defendant was committed for trial was done with malice aforethought.

The Crown also read verified copies of an information, depositions, and warrant of commitment laid, taken, and had against the defendant for the crime of attempting to shoot the deceased on November 25th, 1895, but on which the Crown never went to trial nor indicted the prisoner. It was admitted that the prisoner was now and always had been a man of good repute in the community.

John J. Power, for the prisoner.

Hon. J. W. Longley, A.-G., for the Crown.

HALIFAX, December 18, 1901.

RITCHIE, J. :—The accused may be liberated on his entering into a recognizance with sureties to the amount of \$5000. The recognizance and the sufficiency of the sureties to be submitted to W. T. Pipes, Esq., prosecuting officer. If they do not meet with his approval, they must be approved by me before the accused is discharged.

Order accordingly.

Note : *Bail in homicide cases—Cr. Code secs. 603, 604.*

Hawkins, b. 2, ch. 15, secs. 40 and 80, laid down this rule on the question of bail :—That persons convicted of felony, or who have confessed their guilt, or are notoriously guilty of treason or manslaughter, by their own confession or otherwise, are not to be admitted to bail without some special motive to induce the Court to grant it, for bail is only proper where it stands indifferent whether the party be guilty or innocent of the accusation against him, as it often does before his trial ; but where that indifferency is removed, it would, generally speaking, be absurd to bail him.

In *Rex v. Dalton*, 2 Str. 911, before Lord Raymond, he says that if the depositions amounted only to manslaughter, he would bail, though the coroner's inquest had found it murder ; that *Lord Mohun's case*, in Salk. 104, was in point ; and that the lords bailed him after an indictment for murder.

In *Rex v. Magrath*, 2 Str. 1242, the whole report is this :—“ He was committed for manslaughter ; and it appearing to be no more, upon the depositions

Note—Continued.

before the coroner, the Court admitted him to bail, according to Salk. 104." Both these cases are supposed to be supported by *Lord Mohun's case*, in 1 Salk. 104, which was as follows: "If a man be found guilty of murder by the coroner's inquest, we sometimes bail him, because the coroner proceeds upon depositions taken in writing, which we may look into. Otherwise, if a man be found guilty of murder by a grand jury; because the Court cannot take notice of their evidence, which they, by their oath, are bound to conceal." This case, as reported, certainly proves nothing. No circumstances are given; and, for aught that appears, the Court, on examining the depositions, might have been satisfied of the prisoner's innocence, or that the offence was below the degree of felonious homicide.

These cases have not been followed in more modern times. In *The King v. Weyer*, 2 T.R. 77, the prisoner's counsel moved that he might be bailed, on the ground that the offence charged was not felony, but the Court being of opinion that the offence was felony, the prisoner was remanded. In *The King v. Marks*, 3 East 163, Lord Ellenborough says: "As it appears, then, from the depositions, that there is a corpus delicti, within the meaning of the Act of Parliament, which constitutes it felony, it is our duty to remand the prisoner." The other judges all concurred; and Le Blanc said: "If upon the depositions returned, the Court see that a felony has been committed, and that there is a reasonable ground of charge against the prisoners, they will not bail, but remand them."

A prisoner accused of manslaughter ought not to be bailed unless there be a reasonable doubt of his guilt. *Ex parte Tayloe* (1825), 5 Cowen (N.Y.) 39.

Where a person has been committed upon a charge of wilful murder, found by a coroner's jury, upon evidence sufficient to support the finding, a superior court will not admit him to bail, especially where the accused has made a statement admitting his participation in the affair out of which the charge of murder arises. *Ex parte Baronnet* (1852), 1 El. & Bl. 1.

A party is committed for trial because there is a probability that he would otherwise not appear, and not because he is presumed to be guilty of the offence charged against him. The quality and circumstances of the charge must be some element in deciding whether it is to be fairly presumed that the party accused will appear to take his trial. Accordingly, the seriousness of the offence, the strength of the evidence, and the weight of the punishment, are those generally taken into consideration in deciding whether there is such a presumption or not. Where the charge is wilful murder, and there is a confession of the prisoners, the presumption has always been that no amount of bail will secure the due course of justice; and, except under very special circumstances, the Court do not admit to bail. *Ex parte Baronnet* (1852), 1 El. & Bl. 1, per Coleridge, J.

At the ancient common law all offences, including treason, murder, and other capital felonies, were bailable at the discretion of the Court. 2 Bennett and Heard, C.C. 587 (n). The power to try, acquit, and finally discharge a prisoner seems to imply, as necessarily incident thereto, a power in the same Court to admit to bail or temporarily discharge a person accused of any crime.

Note—Continued.

The authority to set free unconditionally must include the right to do so with a promise of return. Whatever the origin of the power, it is clearly sustained by the authorities on this subject. See 4 Black. Com. 298, 299; 2 Hale, P.C. 129; 1 Chitty, Crim. Law, 93; *Barney's case*, 5 Modern 323; *Egerton v. Morgan*, 1 Bulstrode 69; *Rex v. Marks* (1806), 3 East 157. Although murder was a bailable offence at the early common law, some elementary writers on criminal law have declared that this crime was afterwards excepted by statute. Thus Blackstone says (4 Black Comm. 298), "By the ancient common law, before and since the Conquest, all felonies were bailable, till murder was excepted by statute." Chitty, in 1 Criminal Law, 93, uses similar language. And see 2 Com. Dig. Bail, F. 1. Coke's 2nd Inst. 186. But this remark may be intended to apply only to the power of *magistrates* to admit to bail; which doubtless was not as extensive as that of the Court of King's Bench. Indeed, the power of the latter court to admit to bail in such cases is said by Lord Campbell, in *Bartholomy's case*, 1 El. & Bl. 1, never to have been doubted. Although the power clearly exists in England, it is seldom exercised. Bail is not usually granted after the grand jury have returned a bill of indictment charging the crime of murder. *Regina v. Chapman* (1838), 8 C. & P. 558; *Regina v. Guttredge* (1840), 9 C. & P. 228. It has been done, however, where the prisoner was in such ill health that his life would be in danger from continued close confinement. *Lord Aylesbury's case*, 1 Salkeld 103. But mere ill health, when of a constitutional nature, not endangering life, or if produced by the act of the accused himself, has been declared not sufficient cause to admit to bail in cases of felony. *Rex v. Wyndham*, 1 Strange 4; *Kirk's case*, 5 Modern 454.

The right to bail implies a right to reasonable bail, and at the common law it was a misdemeanor to exact excessive bail, as it tended to deny public justice. 1 Chitty, Criminal Law, 103; *Regina v. Tracy*, 6 Modern 178; *Linford v. Fitzroy*, 13 Queen's Bench, 240.

Usually where a true bill has been found on an indictment for murder, bail will be refused. *R. v. Keeler*, 7 P.R. (Ont.) 117.

The fact that one assize has been passed over since the committal of the prisoner is not a ground for admitting to bail, unless on the first day of such assize he applied under 31 Car. 2, ch. 2, sec. 7, to be brought to trial. *R. v. Mullady*, 4 P.R. (Ont.) 314.

Prisoners held on a coroner's warrant on a charge of murder, where the circumstances raise such a presumption of guilt against them as would warrant a grand jury in finding a true bill, should not be bailed. *R. v. Mullady*, 4 P.R. (Ont.) 314; *Ex parte Corriveau*, 6 Lower Can. R. 249.

The strictness of the practice as to bail in murder cases does not extend to the case of an accessory after the fact, guilty merely of harboring the murderer. *R. v. Murphy*, 1 James (Nova Scotia) 158.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS AND
LISTER. JJ.A.

THE KING v. CLARK.

Theft by employee—Factory regulations for entry and checking of goods removed to warehouse—Collusive arrangement with other employees—Disposal to customer without entry—Fraudulent taking without colour of right—Case reserved—No review of justifiable findings or questions of credibility of witnesses—Criminating answers—Protection on subsequent criminal proceedings if objection taken—Canada Evidence Act, sec. 5—Cr. Code sec. 305, 746, 747.

1. Where the prisoner, being the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to the branch store without charging them or keeping the usual check on them which his employers' system required, and had the goods delivered to a customer of his branch without charging the customer, the prisoner stating that for the benefit of his employers he had merely postponed the charging of the goods in order to give the customer a longer credit than was customary and to so retain the customer's trade; these facts will constitute "theft" under the Code if credence is not given to the prisoner's explanation.
2. The goods having been taken by the prisoner with knowledge that his doing so was contrary to the employers' rules and regulations and with intent to deprive the owner thereof, the taking was fraudulent and without colour of right within Code sec. 305.
3. If a witness when called upon to testify in a criminal proceeding does not object to do so upon the ground that his answers may tend to criminate him, they are receivable against him in any criminal proceeding against him thereafter other than a prosecution for perjury in giving such evidence, and if he does object he is bound to answer, but his answers are then not receivable in evidence against him in a subsequent criminal proceeding except such a charge of perjury.
4. Where on a case reserved or a case stated by direction of a Court of Appeal the sole question is whether there was evidence of guilt, and no leave has been obtained to apply for a new trial on the ground that the verdict is against the weight of evidence, the finding of a jury, or of the trial judge trying the case without a jury, cannot be disturbed as to conclusions or inferences justly capable of being drawn from the evidence, or as to the credibility of the witnesses.

ARGUED : December 23, 1901.

DECIDED : December 31, 1901.

CASE reserved by the county Judge of the county of Wentworth.

It appeared that the prisoner was employed by Messrs. Lawry & Co., who had several branch stores for the sale of

provisions, etc., in the city of Hamilton, which were supplied with goods from a factory or supply station, and that the prisoner was the manager of the branch known as The Market branch.

The system adopted was that orders for the goods required were sent by the different managers of the branches to the factory, and the goods were then sent on waggon to the branches. Slips were prepared by one Lambert, a clerk in the factory, shewing the goods sent, which slips were afterwards checked over by one Keefer, a checker also at the factory, and forwarded by the drivers to the branches.

On the 19th August, 1901, the prisoner instructed the driver going from his branch with an order, to get four tubs of butter and two cheeses from Keefer and to deliver them to a customer of The Market branch, named Holt, the prisoner having previously arranged with Keefer that these goods although loaded upon the waggon, should not be put upon the slip, or, as he subsequently alleged, charged against The Market branch until after the first day of the following month.

When the driver told Keefer that the prisoner had sent him for the goods, Keefer put them upon the waggon himself in the absence of Lambert, who was occupied in another part of the factory, and sent them away without entering them on the slip in the ordinary course.

The goods were delivered by the driver to Holt.

The prisoner elected to be and was tried before the county Judge of the county of Wentworth without a jury, and was found guilty of "stealing the four tubs of lard and two cheese" (sic), and sentenced to four months' imprisonment.

An application was made to the Judge on behalf of the prisoner to reserve a case, which he refused to do, but on an application being subsequently made to the Court of Appeal, he was directed to state a case.

The question as stated was :

" Was there any evidence on which, as a matter of law, the said Judge could legally find the said Arthur Clark guilty of theft as defined by the Criminal Code."

The defence set up by the prisoner at the trial was that Holt was a customer of The Market branch, and had become dissatisfied with his treatment by Lawry & Co., and in the interest of the latter as his employers he desired to retain his custom as well as increase his own business at The Market branch, and that he hoped to do so by giving him longer credit, which by his scheme he could do until after the beginning of the following month, when he intended charging him with the lard and cheese, and having them charged at the factory against the Market branch.

TORONTO, December 23, 1901.

J. V. Teetzel, K.C., for the prisoner: There was no evidence upon which the prisoner could be convicted of theft. He may have been guilty of an infraction of his employer's regulations, but not more, and his object was plainly to give this customer a longer credit than others and so retain his custom for the benefit of his employers. The evidence he gave on the trial of Keefer should not have been received. While he did not object to answer and claim protection, it is submitted it is not necessary that he should do so. Sec. 5 of the Evidence Act, as amended, expressly gives protection where objection is made, but it is contended that the amending Act does not make objection to answer a condition precedent to his protection, and that under *The Queen v. Hammond* (1898), 1 Can. C.C. 373, the evidence is not admissible, notwithstanding no formal objection was taken. The Legislature has not said that the evidence *shall be admissible* if no objection is taken, and the section being one affecting the liberty of the subject, must be construed strictly.

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John R. Cartwright, K.C., Deputy Attorney-General, and *John Crerar*, K.C., for the Crown: Clark had been previously suspected and specially warned to keep the rules of his employers. The Judge's conviction should not be interfered with. It is his province to believe some witnesses and disbelieve others, and he has not believed those called for the prisoner: *The Queen v. Harris* (1898), 2 Can. C. C. 75. The explanation given by the accused is not deserving of credence. We also refer to the definition of "theft:" sec. 305 of the Code, clause (a), and to *Rex v. Morfit* (1815), R. & R. 307. The prisoner's evidence on the other trial was properly admitted. *The Queen v. Hammond* is opposed to *Regina v. Williams* (1897), 28 O.R. 583, and should not be followed, but the amendment made to sec. 5 of the Canada Evidence Act of 1893, 56 Vict. ch. 31 (D.), by 61 Vict. ch. 53 (D.), removes all doubt as to the point in question.

Teetzel, in reply.

TORONTO, December 31, 1901.

ARMOUR, C.J.O.:—I have only to say that the evidence certified and returned to us by the learned Judge shews plainly and beyond any reasonable doubt that the prisoner was guilty of the offence charged, and was properly convicted of it.

OSLER, J.A.:—Upon the whole I have come to the conclusion that we cannot interfere in this case, and that the question which has been submitted by the learned Judge of the county court on the case reserved must be answered in the affirmative, viz., that there was evidence on which, as a matter of law, the said Judge could legally find the said Arthur Clark guilty of theft as defined by the Criminal Code.

We cannot direct the conviction to be reversed merely because we may think that on the evidence, as he reports it, he ought to have decided, or that it would have been safer to have decided, differently.

If upon a perusal of the case we are bound to say that there was in point of law evidence which, if the case had been tried by a jury, the Judge must have submitted to them, or which, there being no jury, he was himself—as a jury—free to consider and determine what weight should be attached to it, we have no jurisdiction to interfere, the trial Judge not having given leave to apply for a new trial on the ground that the verdict was against the weight of evidence.

If there was no such evidence, it is within our province to say so, but if there was, then, so far as the case turns upon the conclusion to be drawn from it and from any inferences it was justly capable of, including all questions as to the credibility of the witnesses, the decision cannot be disturbed.

I thought leave to appeal ought to be granted in the present case, because upon the evidence, as reported, I felt a difficulty in understanding how the prisoner could have been convicted, and I desired to have the matter discussed; but after the full argument which we have heard, my difficulty, at all events as to the learned Judge's actual right to decide as he has done, has been removed.

It does appear—and I desire to confine myself strictly, as I am bound to do, to what has been reported to us, without reference to, and, as far as possible, without being in any way influenced by the extraneous circumstances which were dragged in on the argument, and which might or might not furnish convincing proof, were they in evidence, of the prisoner's guilt—it does appear then, that the arrangement which the prisoner entered into with the witnesses Keefer and McBride, in pursuance of which the prosecutor's goods were delivered to Holt, was, to begin with, to the knowledge of all of them entirely irregular, and contrary to the rules and regulations of the prosecutor, the employer of the prisoner and Keefer, which provided an efficient check, if obeyed, upon the delivery of goods out of the factory, of tracing them into the possession of the prisoner, and of enabling his employer to make him account for them: secondly, that the goods having been delivered to Holt in pursuance of

this arrangement there were no means, in the absence of mere accidental discovery of what had been done, of tracing the goods so delivered: thirdly, that the prisoner, who was entitled to receive payment from Holt for his employer, for goods which he might have lawfully obtained from the factory and sold to him in the regular course of business, was in a position to have received payment from him for the goods thus improperly obtained and irregularly delivered without anything appearing in his employer's books or his own to shew it, and that everything was done to have enabled him, if he were so minded, to defraud his employer with comparative freedom from all risk of discovery.

Taking these facts by themselves, they shew that the goods in question were taken, or caused to be taken, by the prisoner without colour of right, with intent to deprive the owner absolutely thereof, these being two of the ingredients of the offence of theft as defined by sec. 305 of the Code.

Was this done by the prisoner fraudulently, which is the third essential ingredient of the offence?

If the explanations, which were given by the two witnesses I have mentioned, and by the prisoner in the evidence given by him on the trial before the same Judge of some charge against Keefer connected with the same transaction, were to be accepted they would disprove the existence of any intent to defraud, for the prisoner had received no money from Holt, and his professed object, as stated by himself and these witnesses, was to benefit his employer by retaining Holt's business. Holt, it appeared, was a dissatisfied customer, and the prisoner thought he could effect his object by gratifying Holt with a longer credit than he would have had if the goods had been entered, sold and delivered in the regular way.

But the witnesses may have given their evidence in such a manner as to induce the Judge to discredit them, and there is some indication of this in the notes of McBride's evidence, and if so, the Judge was not bound, any more than a jury would have been, to accept or believe the explanation. What the pri-

soner did (apart from its being a disobedience of orders) might have been done in all good faith and honesty, or it might have been part of a scheme to defraud his employer, and if the Judge thought that the explanation was patched up, to put a good face on what was otherwise a suspicious transaction, we cannot say that under all the circumstances, it was not open to him to take that view.

If the transaction had been irregular merely, Holt might have been able to give important evidence in the prisoner's favour. He was not called (and I think the onus was on the prisoner to call him), and this was a circumstance calculated to throw some doubt on the latter's honesty. So, too, the Judge was at liberty (as a jury are, though they must not be told so) to draw an inference unfavourable to the prisoner from the fact that he did not testify on his own behalf, if, at least, he was dissatisfied with the report of the witness Scott of the evidence given by him on the Keefer trial.

A point was made, that the latter evidence had been improperly admitted, but, notwithstanding Mr. Teetzel's ingenious suggestion, I am of opinion that the 5th section of the Canada Evidence Act, 1893, 56 Vict. ch. 31 (D.), as amended by 61 Vict. ch. 53 (D.), removes, as I read it, the ground for the differences of opinion, which prevailed as to the proper construction of the section as it originally stood: see *Regina v. Hendershot and Welter* (1895), 26 O.R. 678; *Regina v. Williams*, 28 O.R. 583; *The Queen v. Hammond* (1898), 29 O.R. 211, 1 Can. Cr. Cas. 373.

If when called upon to testify, that witness does not object to do so on the ground that his answers may tend to criminate him, his answers are receivable against him (except in the case the section provides for) in any criminal trial or other criminal proceeding against him thereafter.

If, on the other hand, he does object, he is protected.

One cannot but feel, that the prisoner was placed at considerable disadvantage, in having his case tried before the same Judge who had (as we were told on the argument) convicted

the two principal witnesses, who testified in his favour for their dealings in the same transaction.

But this is not a circumstance, which warrants us in interfering with the conviction, if there was evidence to support it.

I therefore answer the question stated in the affirmative—there was evidence on which as a matter of law, the Judge could legally find the accused guilty of theft. I feel obliged to say so much; I do not desire to say more.

MACLENNAN, MOSS, and LISTER, JJ.A., concurred.

Conviction affirmed.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

BEFORE WEATHERBE, J., IN CHAMBERS.

THE KING v. HECKMAN.

Piratical act—Offence on the high seas—Revolt in British ship—Charge against seaman not a British subject—Consent of Governor-General to laying information—Merchant Shipping Act, 1894 (Imp.), sec. 686—Admiralty Offence Act, 1849 (Imp.), ch. 96—Criminal Code secs. 128, 542.

1. Per RITCHIE, J., and WEATHERBE, J.—A charge against a seaman not a British subject on a British ship for inciting a revolt upon the ship while on the high seas cannot, if taken only under Code sec. 128, be made without the consent of the Governor-General under sec. 542 obtained prior to the laying of the information.
2. Per RITCHIE, J.—If the proceedings for the offence are taken under the Merchant Shipping Act, 1894 (Imp.), sec. 686, the consent of the Governor-General is not required and Code sec. 542 would not apply.
3. Per WEATHERBE, J.—Code sec. 542 applies to the procedure in Canadian Courts in respect of offences committed within the Admiralty jurisdiction whether the proceedings are taken under the Criminal Code or the Imperial Merchant Shipping Act or the Admiralty Offence Act, 1849 (Imp.).

DECIDED: December 26, 1901, and January 8, 1902.

Motion on the return of a writ of habeas corpus before RITCHIE, J., for the discharge of the above named defendant out of the custody of the keeper of the common jail at Halifax

where he was confined as committed for trial on a warrant of commitment for safe custody made on December 23rd, 1901, by the stipendiary magistrate of the City of Halifax, charging him for that he "did on the 9th day of December A.D. 1901, on the high seas on board a British foreign sea going ship on a voyage from St. Kitts, British West Indies, to Halifax via Bermuda (he then being an articted seaman on board said ship), unlawfully endeavour to make a revolt in said ship for which he has not been tried before being brought to Canada where he now is in the port of Halifax."

The information charging the said offence, and the depositions, consisting only of the evidence of the captain and the first officer, taken thereon by the committing magistrate being on the files of the Court, having been transmitted there under the authority of sec. 600 of the Criminal Code were by the permission of the learned judges read by the prisoner on his said applications. They disclosed that the prisoner, a German by nationality, was an articted seaman on board the British steamship "Benedic," and that on the 9th of December, 1901, when on the high seas on board said ship, between three and a half and nine miles after leaving the Island of St. Kitts, British West Indies, being intoxicated, struck the first officer who came into the fore-castle to search for stowaways. It was not clear whether the blow was inflicted unprovokingly by the prisoner or in self-defence; as it was given during an altercation between him and the mate. Shortly afterwards, in another altercation between another drunken seaman and the said officer, the prisoner was said to have encouraged by words the other seaman to defend himself, and on that seaman's request to have passed him something that looked like a knife. There was no evidence that the prisoner had done any act in furtherance of any design to interfere with the supreme command and management of the ship.

The prisoner being unable to furnish the bail required by the order of Ritchie, J., in Chambers, renewed the application to Weatherbe, J., in Chambers.

HALIFAX, December 24, 1901.

John J. Power, for the prisoner.

F. B. Scott, for the Attorney-General of Nova Scotia.

HALIFAX, December 26, 1901.

RITCHIE, J.:—The evidence, I think, shews that the offence, if any, was committed on the high seas, on a British ship, and clearly within the jurisdiction of the Admiralty. Chapter 73 of 41 and 42 Vict. (Imp.) is not applicable, as it refers solely to offences committed within a marine league of the coasts of His Majesty's dominions.

If the Crown is obliged to proceed under sec. 128 of the Code alone, I do not think it can be done until the consent of the Governor-General has been obtained in accordance with sec. 542, which requires this to be done before proceedings shall be instituted.

The case of *Thorpe v. Priestnell*, [1897] 1 Q.B. 159, decides that the laying of the information is the institution of the suit, and as no authority was given in this case the proceedings would, in my opinion, be defective.

But full provision is made for the trial and punishment of such offences under sec. 686 of the Merchant Shipping Act, 1894 (Imp.), and no restriction or conditions are imposed with reference to the procedure or trial as in our Code.

I have read over the depositions, and although I do not think there is sufficient evidence to convict the accused of piracy, it shews that he has infringed sections of the Merchant Shipping Act, for which he is liable to imprisonment. Under the circumstances I cannot discharge him, but will order him to be admitted to bail, himself in \$300 and two sureties of \$150 each.

Order for bail.

The prisoner, being unable to furnish the bail required, renewed the application before WEATHERBE, J., in Chambers, on January 3, 1902, the same counsel appearing.

HALIFAX, January 8, 1902.

WEATHERBE, J.:—I agree with the opinion given by Mr. Justice Ritchie on the prisoner's former application before him for his discharge from custody that these proceedings against the prisoner, being laid under sec. 128 of the Code, are without jurisdiction for want of the consent required by sec. 542 of the Code. Section 686 of the Imperial Merchant Shipping Act, 1894, relied on by Mr. Justice Ritchie to eventually sustain the proceedings, if it applies, confers power on a British Colonial Court of Criminal Jurisdiction to try a foreigner or a British subject found within its jurisdiction for any offence committed by him on board of a British ship on the high seas, provided such Colonial Court could have tried such a person if the offence had been committed within the limits of its ordinary jurisdiction. Such an offender, when he comes within the jurisdiction of that Court, is subject to the general law of the place regulating the procedure for trying such offences. I think the Admiralty Offence Act of 1849, 12 & 13 Vict. (Imp.), ch. 96, must receive a like construction.

If this be so, and such a person were to be tried in Canada, proceedings with that end in view would still require the consent spoken of in sec. 542 of the Code. It follows from this that if the committing magistrate had no jurisdiction, the depositions as such are worthless as evidence against the prisoner. But if they can be looked at I am of the same mind as the learned Judge who has already expressed his opinion that they do not disclose that Heckman committed the crime of piracy for which he is now in custody.

Prisoner discharged.

Note: Habeas Corpus—Successive applications.

The practice in Nova Scotia permits of a prisoner in custody making an application to a Supreme Court judge sitting in Chambers for his discharge under habeas corpus proceedings, and if the application be refused or be granted only conditionally, the prisoner is entitled to make successive applications for his discharge to the other judges of the Supreme Court separately, or he may apply to the Supreme Court sitting in banco. *Re Piaget*, 21 C.L.T. 536;

Note—Continued.

Re Anderson, 7 Jurist N.S. 121; *Cox v. Hakes*, 15 App. Cas. 514; *Ex parte Byran*, 22 N.B.R. 436.

But in extradition cases, the jurisdiction by way of habeas corpus is during the session of the court in banco restricted to it, and a judge sitting in chambers cannot then order a discharge. Nova Scotia Crown Rule 150.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HONORABLE MR. JUSTICE STREET, IN CHAMBERS.

THE KING v. WATTS.

Extradition—Proof of foreign law—Presumption as to crimes of like designation—Onus of proof—Child stealing—Wilful removal of child by father after divorce awarding custody to mother—Objection that divorce collusive—Collateral attack of decree before extradition commissioner.

1. In the absence of evidence to the contrary, it should be assumed that the crime of 'child stealing' referred to in the extradition convention between Great Britain and the United States is identical with the offence so designated by Canadian law.
2. It is competent for the prisoner in extradition proceedings to shew that the crime of 'child stealing' under the foreign law was not covered by the facts disclosed on the depositions, and where such is shewn the prisoner should be discharged.
3. The child's own father may be guilty of child stealing within sec. 284 of the Code, if after a divorce by a court of competent jurisdiction and the award thereon of the custody of the child to the mother, the father wilfully removes the child from her custody.
4. An objection by the husband to the validity of the divorce on the ground of collusion cannot, where the collusion is denied on oath, be adjudicated upon by the extradition commissioner, but extradition should be ordered notwithstanding such objection and the prisoner left to his right to contest the divorce decree at his trial by the foreign court.

ARGUED: January 31, 1902.

DECIDED: February 15, 1902.

THE prisoner was committed by the extradition commissioner at Windsor, in the county of Essex, for extradition for child stealing committed in the State of Illinois.

A writ of *habeas corpus* was issued, and the proceedings were brought up on *certiorari*. On the return of the writs the counsel for the prisoner moved for his discharge.

TORONTO, January 31st, 1902.

A. B. Aylesworth, K.C., and F. A. Anglin, for the defendant, contended there had been no offence indictable under our law; that there had only been a disobedience of an order of a foreign Court; and that there was a waiver of the regulation as to returning the child the same day: *In re Gross* (1898), 25 A.R. 84, 86; R.S.C. ch. 142, sec. 11; the 10th Article of the Ashburton Treaty of 1842 (see Imp. 6-7 Vict. ch. 76); the Convention between the United States and Great Britain of July 12th, 1889, in Dominion Statutes of 1890, 52-53 Vict., at p. xliii; the Criminal Code, 55-56 Vict. ch. 29, sec. 284, relating to the stealing of children under 14; also *ib.* secs. 264, and 283.

[G. F. Shepley, K.C., for the Crown, stated that he would confine his argument to sec. 284.*]

Aylesworth, continuing, contended that a parent cannot steal his own child; the possession was rightful, only the detention was objected to: *The Queen v. Flowers* (1886), 16 Q.B.D. 643; *Regina v. Olifer* (1866), 10 Cox C.C. 402; that there was no evidence of the foreign law: *In re Phipps* (1883), 8 A.R. 77; *Re Murphy* (1894-5), 26 O.R. 163, 177, 22 A.R. 386; *The Queen v. The Governor of H.M. Prison at Holloway* (1900), 16 Times L.R. 247; *Re Arton*, [1896] 1 Q.B. 509, 510, 516-7; *Ex parte Seitz* (No. 2) (1899), 3 Can Cr. Cas. 127; *Sussex Peerage Case* (1844), 11 C. & F. 85, 114, 117; Taylor on Evidence, 9th ed., secs. 1423, 1425, 1525; that the decree was collusive and such as no Court would give effect to: *Bonaparte v. Bonaparte*, [1892] P. at p. 410; *Duchess of Kingston* (1776), 20 How. St.

*284. Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to deprive any parent or guardian, or other person having the lawful charge, of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child unlawfully,—

(a) takes or entices away or detains any such child; or

(b) receives or harbours any such child knowing it to have been dealt with as aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child.

T. at p. 479; *In re Belencontre*, [1891] 2 Q.B. 122; *Churchward v. Churchward*, [1895] P. 7; *Hollender v. Ffoulkes* (1894), 26 O.R. 61; *Vadala v. Lawes* (1890) 25 Q.B.D. 310; *In re John Anderson* (1857), 11 U.C.C.P. 1, 25.

Shepley, for the Crown, as to there being no proof of the offence charged being one under the law of Michigan, cited *Re Murphy*, 26 O.R. 163, 22 A.R. 386; R.S.C. ch. 142, sec. 2, sub-sec. (b), and sec. 9; and contended that the English cases cited do not shew that foreign law must be proved, but only that there must be an enquiry as to whether the crime is extraditable; that sec. 284 of the Criminal Code does not exclude a parent; that other questions raised were mere matters of defence to be urged at the trial; that where there is something in a contempt of Court which includes a criminal act, the latter is a proper subject for indictment; that the question as to good faith in the original taking of the child was one for the jury.

Anglin, in reply, cited *Paley on Conviction*, 7th ed., pp. 132, 198; *Commonwealth v. Myers* (1892), 146 Penn. 24.

TORONTO, February 15, 1902.

STREET, J.:—The evidence taken before the commissioner shews that the prisoner was married in 1895, his wife being the complainant Mary E. Watts, and that they had their domicile in the State of Illinois, where they were married. In the year 1900 a decree of divorce was obtained by the wife upon the ground of cruelty and the marriage was absolutely dissolved, and ordered to be forever held at naught. The child in question was born in 1897, and by the terms of the decree the care and custody of it were given to the wife, Mary E. Watts, with permission to the prisoner to see it at all suitable times, "and to take it out riding with him in the day time as he may wish, but to return it to the complainant the same day."

The prisoner, after the decree, frequently called at the complainant's house for the child and took it for a drive, returning it sometimes on the same day, sometimes the next day. One

and say he called and obtained the child as usual, but instead of returning it, he carried it off at night out of the State, and eventually brought it to Canada. The grand jury of the county of Sangamon in the State of Illinois, from whence the child was so taken, found a true bill against the prisoner, containing the charge under several heads, one of which is, that the prisoner "did wilfully, and without lawful authority, forcibly and feloniously, take and carry away one Catharine H. Watts, an infant under the age of 12 years, without the consent of the lawful custodian of such child, contrary to the form of the statute in such case made and provided," etc.

Another count charges the same offence, omitting the word "forcibly," and adding that the child was taken away with intent to deprive its lawful custodian of its custody. .

The first objection is that no evidence was given before the commissioner that the circumstances above referred to constitute a crime under the law of the foreign State.

The cases upon the point raised by this objection are extremely conflicting. A number of them are referred to in the comparatively late case of *Re Murphy*, 26 O. R. 163, 177, and 22 A. R. 386. See also *Re Bellencontre*, [1891] 2 Q. B. 122; *Re Arton*, [1896] 1 Q. B. 509; *Ex parte Seitz* (No. 2) 3 Can. Cr. Cas. 127.

The decision of the Divisional Court in *Re Murphy*, upon the point now under consideration, was sustained in the Court of Appeal by an equal division of opinion in the members of the Court, and I think I should follow it. In any event, my view of the proper course to be taken under the statute in the present case is in accord with the opinion expressed by the Divisional Court in that case. It seems to me, to take an extreme case, that if the crime charged were murder, and the facts sworn to before the extradition commissioner were such as would constitute that crime under our law, it would be unnecessary for the Crown to prove that the same facts also supported a charge of murder in the foreign State. In the present case we find the crime of "child stealing" mentioned in

the Treaty as one of the extradition crimes, and I think we should, in the absence of any evidence to the contrary, assume the crimes to be identical in the two countries. It seems to me that, under sub-sec. 3 of sec. 9 of the Act, R.S.C. ch. 142, it would have been competent for the prisoner to shew that the crime of child stealing under the foreign law was not covered by the facts deposed to here, and if that were done, then, I think, the prisoner should be discharged; but in the absence of any such evidence the objection should not prevail.

Another objection is, that the facts in evidence do not under our law shew the crime of child stealing, within the meaning of our statute, to have been committed, and there is perhaps room for differences of opinion as to whether a father could be charged under the Act with stealing his own child. After a great deal of consideration, I have been unable to see why the statute, sec. 284 of the Criminal Code, should not cover a case of this kind. By the decree of a Court of competent jurisdiction in an action to which he was a party, and of the result of which he was fully aware, he was deprived of his right to the custody of the child, his marriage ties were absolutely dissolved, and the mother of the child became its sole custodian, subject to certain limited rights, as to the extent of which there could be no misapprehension.

There was, from the time of this decree, only one person entitled by law to the custody of the child, and that person was its mother, and I can find no good reason, under such circumstances, why the father, wilfully removing the child, as he is sworn to have done, from the custody of the mother, should be held to be excepted, by reason of his relationship to the child, from the operation of the Act. It was argued that what he did was a mere contempt of Court. It is quite true that it was a contempt and disobedience of the judgment of the Court, but if a man has committed a crime it does not become less a crime because it also happens to be a contempt.

I think this objection must also fail.

The remaining objection is, that the prisoner acted in good

faith and under the belief that he was legally entitled to the custody of the child. The reason given for this belief is that he says he had been advised that the decree of divorce was a nullity because, he says, it was obtained by collusion between himself and his wife. It was said that the fact of its having been obtained collusively is not denied, but I see that the complainant does deny it. This is an objection, however, in my opinion, which may properly be set up as a defence by the prisoner upon his trial, but which could not properly be dealt with by the magistrate who had before him the decree of the foreign Court, and the oath of the complainant that she did not collude.

For these reasons I think the objections should be overruled and the prisoner remanded.

Discharge refused.

Note:—Evidence to obtain extradition.

To justify the committal of an accused person for extradition, it is only necessary that the evidence should be such as gives rise to probable cause to believe him guilty, and it is not necessary that it should be sufficiently conclusive to authorize his conviction is unanswered. *Ex parte Isaac Feinberg*, (1901), 4 Can. Cr. Cas. 270 (Que.).

Any reasonable doubt must go in favour of committal and not of discharge. *Ibid.*

If the crime proved to be one which by universal acceptance is recognized both in the foreign country and in Great Britain as a felony at common law, and it comes within the class of extraditable crimes mentioned in the treaty, it is unnecessary to prove by experts that the foreign law is similar to ours in respect to it. *Re Hall* (1882), 2 Ont. App. 31, 43; *Re Gross* (1898), 2 Can. Cr. Cas. 67 (Ont. C.A.).

In *Re Murphy* (1894), 2 Can. Cr. Cas. 562, it was held by the Common Pleas Division in Ontario that where such a state of facts is established as would if their occurrence had taken place in Canada have demanded a committal for trial, the duty to commit for extradition arises under the Extradition Act (R.S.C. 1886, c. 142, s. 11) if the offence charged be one of the offences covered by the treaty with the foreign country; and that it is unnecessary for the prosecutor to prove that by the law of the foreign country the alleged offence is there a crime of a like designation. The charge in that case was for uttering a forged document, and the question involved was whether a cheque fraudulently drawn in a fictitious name and negotiated in pursuance of a conspiracy to defraud constituted a "false document" so as to support a

Note:—Continued.

charge of forgery or uttering. The Common Pleas Division (Ont.) held that it was, and an appeal was taken to the Court of Appeal for Ontario, where the decision was upheld on an equal division of opinion in that court. Burton and Osler, JJ.A., thought it necessary for the prosecution to make out a *prima facie* case that the alleged offence is a crime according to the law of the demanding country as well as under Canadian law; but Hagarty, C.J.O., and MacLennan, J.A., held that such evidence is unnecessary, concurring in this respect with the court appealed from. *Re Murphy* (1895), 2 Can. Cr. Cas. 578 (C.A.).

Depositions or statements taken in a foreign state on oath, or on affirmation where affirmation is allowed by the law of the state, and copies of such depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence. R.S.C., 1886, c. 142, s. 10. Where the facts in evidence, though sufficient to warrant extradition if they had been deposed to by witnesses able to testify to their actual occurrence, were sworn to from information only on the taking of the depositions in the foreign country, the depositions were held insufficient. *Re Parker* (1882), 9 P.R. (Ont.) 332, per Osler, J.

The extradition commissioner is bound to receive the evidence of any witness tendered to show the truth of the charge, R.S.O. 1897, c. 142, s. 9 (2). And he must also receive any evidence tendered to show that the crime of which the fugitive is accused or alleged to have been convicted is an offence of a political character, or is, for any reason, not an extradition crime, or that the proceedings are being taken with a view to prosecute or punish him for an offence of a political character. *Ibid.*

The prisoner is entitled to deny his identity with the person named in the warrant, and also to have read in his presence the depositions on which he is charged. Clarke on Extradition, 3rd ed. 215. It was formerly held that a prisoner could only give evidence to disprove his identity with the person named in the extradition warrant, not his identity with the person who actually committed the extradition crime. *Re Garbutt* (1891), 21 Ont. R. 179, 21 Ont. App. R. 465. At that time the Canadian law did not permit of calling witnesses for the defence on the preliminary inquiry before justices in respect of an indictable offence. This was changed by the Criminal Code of 1892, which enacted that "every witness called by the accused who testifies to any fact relevant to the case shall be heard, and his depositions shall be taken in the same manner as the depositions of the witnesses for the prosecution. Code sec. 593.

As the requirement of the Extradition Act (R.S.C. 1886, c. 142, sec. 11) is that such evidence be produced as would, according to the law of Canada, subject to the provisions of that Act, justify his committal for trial if the crime had been committed in Canada, it seems to follow that evidence to disprove identity with the person who actually committed the crime is now permissible, and that the decision in *Re Garbutt*, *supra*, is

Note:—Continued.

superseded by the Criminal Code. But if sufficient unexceptionable evidence of identity is produced by the prosecution, the commissioner must commit, notwithstanding the contradictory evidence on the prisoner's behalf, if there is such a conflict of evidence as should go to a jury. See *Clarke on Extradition*, p. 218.

The statutory requirement is that there shall be such evidence as would according to the law of Canada justify a committal for trial. Whether or not this extends also to the nature of the crime (see *Re Anderson*, 20 U.C.Q.B. 164, 10 U.C.C.P. 60), it is clear that it relates to the nature and amount of evidence required, and the general rules of evidence applicable to that part of Canada where the proceedings are taken must be observed. Hearsay evidence is not admissible, nor are statements made by the prisoner after threats or promises held out to him. *Clarke on Extradition*, 3rd ed. 218. To justify the admission in evidence of an alleged confession of the prisoner it must be affirmatively proved that such confession was free and voluntary, and was not preceded by any inducement held out by a person in authority, or was not made until after such inducement had clearly been removed. *Re Ockerman* (1898), 2 Can. Cr. Cas. 262, 6 B.C.R. 143.

Sir Edward Clarke in his work on *Extradition*, 3rd ed., page 216, says with reference to the duties of magistrates in extradition matters under the English Act:—"If he find sufficient evidence of guilt to justify a commitment, the question of a probability of a conviction is not one for his consideration. But it naturally follows from this that he should be strict in requiring proof of the criminality of the acts which are charged. In an ordinary case he can commit the prisoner upon bail, and leave difficult questions of law to be dealt with by the court above; but in an extradition case he is to ascertain, not the commission of certain acts upon whose character another and higher tribunal may decide, but that there is sufficient evidence that the crime specified in a foreign warrant has by the prisoner been committed."

If on the examination the commissioner finds that the acts are not disputed, but that a justification is established antecedent to and independent of the acts themselves, he must discharge the prisoner. *Clarke*, p. 219. So where on a charge of forgery an authority to sign is shown, there should not be a committal for extradition. *R. v. Gould*, 20 U.C.C.P. 154. Such evidence as to the quality of the act charged removes it altogether from the class of crimes by the operation of a rule of law, by showing that it had an antecedent justification. But a different rule applies where it is desired by evidence as to the acts themselves to show a justification arising out of the circumstances or to reduce the amount of the guilt which is involved. *Clarke*, p. 220. So if the prisoner be charged with murder, and the evidence for the prosecution shows a *prima facie* case of wilful killing, it is not for the magistrate to decide how far provocation, terror or accident affected the guilt of the act. *Ibid*; *Bennett's case*, 11 L.T. (N.S.) 489.

[SUPREME COURT OF CANADA.]

BEFORE FOURNIER, TASCHEREAU, GWYNNE, SEDGEWICK AND
KING, JJ.

McINTOSH v. THE QUEEN.

Theft — Fraudulent misappropriation by co-owner — Fraudulent receiving by another co-owner — Undivided property of co-heirs — Conviction of principal as evidence against receiver — Presumptive evidence — Receiver controverting principal's guilt — Contemporaneous appropriation by principal and receiving by accessory — Court of Appeal unanimously affirming conviction on one ground — Dissent on another ground — Appeal to Supreme Court of Canada — Cr. Code secs. 61, 305, 311, 363, 742.

1. Where the Court of Appeal is unanimous in affirming the conviction as to one of the grounds of appeal but there is a dissent as to another ground, a further appeal to the Supreme Court of Canada under Code sec. 742 can be based on the latter only, and the appeal cannot be dealt with in respect to the ground on which the Court of Appeal was unanimous.
2. Theft by the fraudulent appropriation by the principal and a fraudulent receiving by an accessory before the fact of the property so appropriated may take place at the same time and by the same act.
3. A conviction for receiving is good although the same evidence would have supported a conviction for theft.
4. On a charge of fraudulently receiving stolen property the previous conviction of the principal for the theft is presumptive evidence that everything in the former proceeding was rightly and properly transacted, but it is competent for the alleged receiver to controvert the guilt of the principal.
5. A conviction for theft may be made against a co-owner fraudulently misappropriating the fund (Code secs. 305, 311) although the facts also prove the offence of criminal breach of trust (Code sec. 363).

ARGUED: April 2, 1894.

DECIDED: May 1, 1894.

Appeal from the judgment of the Court of Queen's Bench for Lower Canada (appeal side) on an appeal from the decision of the trial judge refusing a motion for a reserved case after verdict: Q.R. 2 Q.B. 357.

The reserved case submitted to the Court of Queen's Bench by Mr. Justice Wurtele, the trial judge, was as follows:—

“The prisoner Alexander McIntosh was tried before me on two counts; by the first, for having unlawfully and with intent to defraud, taken and appropriated to his own use \$7,000

belonging to the heirs Dalrymple, so as to deprive them of their beneficiary interest in such sum; and, by the second, for having received such sum from one James Dalrymple, who had so unlawfully and with intent to defraud the heirs Dalrymple, taken and appropriated the same to his own use, so as to deprive them of their beneficiary interest therein, knowing the same to have been so unlawfully taken; and on the 14th September last (1893) he was acquitted on the first count and was found guilty on the second.

After the rendering of the verdict, on the 20th September, 1893, Mr. St. Pierre, Q.C., of counsel for the prisoner, moved:

“That inasmuch as, according to the evidence adduced on behalf of the Crown, the money referred to was appropriated by one James Dalrymple, who was the proper keeper of that money, in his capacity of testamentary executor of the late James Dalrymple, and inasmuch as the act of appropriation by the said James Dalrymple only took place at the time when the money was handed over to the accused McIntosh, which act, to wit, that of handing over by Dalrymple and that of receiving by McIntosh formed but one single undivided act: the following point be therefore reserved for the decision of the Court of Queen’s Bench, appeal side:—

“Whether McIntosh could be rightfully convicted of the crime of feloniously receiving a certain sum of money, knowing it to have been stolen.

“And that inasmuch as according to the same evidence the money referred to is alleged to be the undivided property of several heirs, who have never apportioned their respective shares; the following point be reserved for the said Court of Queen’s Bench, appeal side:—

‘Whether the accused could be found guilty of feloniously receiving money, of which he was part owner, for an undivided and indefinite share.’

“In my opinion, the evidence shewed that one Arthur Brennan owed \$5,375 to the heirs Dalrymple; that James Dalrymple, and the prisoner as the legatee of his wife, had each a

certain share of this money; that all the interested parties gave Mr. Brennan an acquittance, and agreed that James Dalrymple should receive the money from Mr. Brennan and divide it among them; that he did receive the amount on the 19th November, 1887, but that instead of dividing it, he handed it over to the prisoner on the evening of the day on which he had received it, together with other moneys coming from payments of interest belonging to the heirs, which he had previously received as executor, and which formed together a total sum of \$7,000; that after receiving the \$5,375 from Mr. Brennan the prisoner went to the Windsor Hotel and bought a railway ticket for New York, taking for that purpose some of the money which he had received from Mr. Brennan and thereby breaking its bulk; that the prisoner had previously, on the 10th November, 1887, drawn from the savings bank, where he had deposited the moneys coming from interest, the sum which he added to the money received from Mr. Brennan and which formed with it the sum of \$7,000; that it had been previously agreed between James Dalrymple and the prisoner that the former would fraudulently appropriate the money due by Mr. Brennan when it should be paid to him, and that he would abscond immediately afterwards, and that he drew the money from the savings bank with the intention of appropriating it and of absconding; that when he handed the money over to the prisoner he told him that it was the "boodle" and that, on the evening of the 19th November, 1887, James Dalrymple fled to the United States, and the prisoner went to the railway station to see him off.

"I was of opinion, as James Dalrymple, when he received the money from Mr. Brennan, as a bailee, intended to misappropriate it and to defraud his co-heirs of their shares and had carried out that intent with the previous knowledge and connivance of the prisoner, that he had appropriated it to his own use, so as to deprive them of their beneficiary interest in it, before he had handed it to the prisoner; that the fact of breaking the bulk and taking some of the money to buy the railway ticket constituted a fraudulent appropriation of the money and

ended his relation to his co-heirs of bailee; that moreover the fact of drawing the money of the heirs which he had deposited in the Savings Bank, with the intention of appropriating it to himself and fleeing to the United States, also ended his relation to his co-heirs of bailee of that money and rendered him guilty of fraudulent appropriation; and that the prisoner knew, when the \$7,000 were received by him, that they had been previously fraudulently taken and misappropriated, and I therefore declared that the first point was not well taken."

"I was also of opinion that under section 85 of the Larceny Act (ch. 164 of the Revised Statutes of Canada) James Dalrymple was rightfully indicted and convicted of having unlawfully taken the \$7,000 as under that section any one, being one of several beneficiary owners of any money, who steals or unlawfully converts the same to his own use or to that of any other person, is liable to be dealt with as if he had not been one of such beneficiary owners, and that as a consequence the prisoner was rightfully indicted and found guilty under section 83 of the same Act for having received this money knowing it to have been unlawfully taken and misappropriated; and I therefore also declared that the second point was wrongly taken."

"I had no doubts on the two points, and on the 23rd September last (1893), I consequently refused to reserve the two questions which the prisoner's counsel asked me to submit for the opinion of the Court of Appeal. The prisoner thereupon applied for leave to appeal from my ruling or decision, and on the 25th November last (1893), leave to appeal was granted."

"In conformity with paragraph 3 of section 744 of the Criminal Code, 1892, the present case is now stated by me; and I now submit for the opinion of the Court of Appeal, the two following questions, viz.:"

"1st. Whether, under the circumstances, the prisoner has been rightfully convicted of the crime of unlawfully receiving the sum of \$7,000 from James Dalrymple, knowing it to have been previously unlawfully taken and misappropriated,

inasmuch as James Dalrymple was the bailee of such money and only parted with it when he handed to him."

"2nd. Whether the prisoner could be found guilty of unlawfully receiving the money of which he was part owner for an undivided share, inasmuch as the money was the undivided property of the heirs Dalrymple, of whom he represented one."

H. C. Saint-Pierre, Q.C., for appellant, relied on and cited: *The Queen v. Warner*, 7 Rev. Leg. 116; *The Queen v. Perkins*, 2 Den. C.C. 459; *The Queen v. Smith*, 11 Cox C.C. 511; Russell on Crimes, by Greaves, 4 ed. 2 vol. p. 236; Roscoe's Criminal Evidence, 4 ed. 1874, p. 638; *The Queen v. Berthiaume*, M.L.R. 3 Q.B. 143; *The Queen v. St. Louis*, 10 L.C.R. 34; *Mooney v. The Queen*, Stephen's Dig., vol. 3, p. 423.

M. J. F. Quinn, Q.C., for the respondent: *Queen v. Ashwell*, 16 Q.B.D. 190; *Queen v. Craddock*, 20 L.J.M.C. 31; *The People v. Smith*, 23 Cal. Rep. 280; R.S.C. ch. 164, secs. 85, 65; Crankshaw on The Criminal Code, art. 742

The judgment of the majority of the Court was delivered by TASCHEREAU, J.:—

Two questions were submitted to the Court of Appeal in Montreal in this case.

1st. "Whether the accused could be found guilty of feloniously receiving money from a person who had a legal right to the custody of that money but who had a felonious intent to the knowledge of the accused in intrusting the latter with said money; "

2nd. "Whether the accused could be found guilty of feloniously receiving money of which he was part owner for an undivided and indefinite share."

Upon the second question, the learned judges were unanimous in the opinion that under sec. 85 of the Larceny Act, applicable to this case, there was no doubt that the objection taken by the accused on the point therein mentioned was unfounded, and consequently, there being no dissent on that question, no appeal

thereon lies to this Court, and it has been abandoned at the hearing. Section 742, Criminal Code of 1892; *Reg. v. Cunningham*, Cassels' Dig., 2nd ed., 107. The first question, therefore, one of the learned judges having dissented from the judgment against the accused, is the only one before us. It is loosely drawn; the terms "feloniously" and "felonious intent" are not felicitous expressions in relation to a misdemeanour. However, we understand what the question means.

The facts of the case are as follows:—

During the November term of the year 1892, two bills of indictment were presented by the Grand Jury: one against James Dalrymple, and the other against McIntosh, both under secs. 85 and 83 of the Larceny Act, then in force. Both bills were drafted in exactly the same terms. By the first count each was charged with having unlawfully and with intent to defraud taken and appropriated to his own use, seven thousand dollars belonging to the heirs Dalrymple, so as to deprive them of their beneficiary interest in the same.

The second count was worded as follows: "And the jurors aforesaid, upon their oath aforesaid, do further present: that the said Alexander McIntosh, on the nineteenth day of November, in the year of our Lord, one thousand eight hundred and eighty-seven, at the city of Montreal in the district of Montreal, unlawfully did receive a certain sum of money, to wit, the sum of seven thousand dollars, the property of Mary Dalrymple, Ellen Dalrymple, Caroline Dalrymple and George Dalrymple, which said sum of money, to wit, said sum of seven thousand dollars, had before then been unlawfully obtained and taken and appropriated by one James Dalrymple, the obtaining and the taking of which sum of money, to wit, of said sum of seven thousand dollars, by the said James Dalrymple, as aforesaid, is made a misdemeanour in and by a virtue of section eighty-five, chapter one hundred and sixty-four of the Revised Statute of Canada, he (said Alexander McIntosh) at the time when he so received the said sum of money, to wit, the said sum of seven thousand dollars, as aforesaid, well knowing the same to have

been so unlawfully appropriated, obtained and taken by the said James Dalrymple as aforesaid."

James Dalrymple pleaded guilty to the charge on the first count, and McIntosh was acquitted of the charge contained in the first count of the indictment, but was found guilty on the second, to wit, on the charge of receiving.

The prisoner's counsel thereupon moved for a reserved case, which subsequently was heard before the Court of Appeal on the two questions above mentioned.

Mr. Justice Wurtele, who presided at the trial, stated the case as follows:—(His Lordship then read from the reserved case, and proceeded as follows):—

"The fact that Dalrymple bought his railway ticket out of that money, were it material, cannot be denied by the appellant here as he has attempted to do. The facts must be taken as stated by the learned Judge who presided at the trial, and cannot in any way be contradicted."

The majority of the judges of the Court of Appeal held that Dalrymple was not a bailee, but a trustee; that as a trustee he was properly indicted under sec. 85; that Dalrymple's appropriation took place before he handed the money to appellant; that appellant was properly convicted of receiving; and that there was a fraudulent appropriation.

The learned Chief Justice, in a dissenting opinion, agrees that Dalrymple was guilty of fraudulent appropriation as a trustee, but that he ought to have been indicted under sec. 65; that he was not liable under sec. 85; that because he was not liable under sec. 85 the appellant could not be found guilty of the offence described in the indictment, *i.e.*, receiving money previously unlawfully obtained, taken and appropriated by the said James Dalrymple under circumstances which made such taking a misdemeanour under sec. 85; that consequently the offence has not been proved as charged.

Section 85 of ch. 164 R.S.C. is in the following terms:—

Every one who unlawfully and with intent to defraud by

taking, by embezzling, by obtaining by false pretences, or in any other manner whatsoever, appropriates to his own use, or to the use of any other person, any property whatsoever, so as to deprive any other person temporarily or absolutely, of the advantage, use or enjoyment of any beneficial interest in such property in law or in equity, which such other person has therein, is guilty of a misdemeanour and liable to be punished as in the case of simple larceny, and if the value of such property exceeds two hundred dollars, the offender shall be liable to fourteen years' imprisonment.

Section 83 of the same Act provides that:—

Any one who receives any money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof, is made a misdemeanour, by this Act, if he knows the same to have been unlawfully stolen, taken, obtained, converted and disposed of, is guilty of a misdemeanour, and liable to seven years' imprisonment.

Were it not for the dissent of the learned Chief Justice of the Court of Queen's Bench, and of my brother Gwynne in this Court, I would say that the appellant's contestations are altogether unfounded. He would argue, I understand, that because Dalrymple might have been indicted under sec. 65 of the statute he could not be indicted under sec. 85. But why not, if the facts proved constitute an offence under the latter section?

We have an express statutory enactment that if any one is punishable under two or more statutes, or two or more sections of the same statute, he may be indicted under any of them. Section 933 Code (a re-enactment). The question arises then, whether under the facts provided in the case, Dalrymple was guilty of the misdemeanour created by sec. 85.

There is no doubt but that McIntosh was not precluded by Dalrymple's conviction from proving that Dalrymple was not guilty under sec. 85.

When the principal has been previously convicted then the conviction is presumptive evidence that everything in the former proceeding was rightly and properly transacted, yet it is competent to the receiver to controvert the guilt of the principal: 2 Russell on Crimes, 4 ed., 571. But the fraudulent appropriation by Dalrymple is clearly established, and the facts proved fully support the finding of the jury against McIntosh. Whether Dalrymple was a bailee, or a trustee, or neither one nor the other is immaterial. Every one, says this clause, never mind who he is, whether he has a right to the possession or not, or to legally hold or not, who unlawfully and with intent to defraud, etc. Now, here, the intent to defraud cannot be questioned: therefore, the possession of this money by McIntosh, however lawful it might have been, became unlawful by this preconceived plan of criminally appropriating it. And whether he might be said to have taken it, or embezzled it, or stolen it, or obtained it by false pretences, is immaterial. All of these fraudulent conversions are covered by this sec. 85 with the addition of "in any other manner whatsoever." The fraudulent appropriation of the money so as to deprive the heirs Dalrymple of their beneficiary interest in it, cannot be, and is not denied by the appellant, but he bases on the facts proved a second objection to the conviction. He argues that even if Dalrymple were guilty of fraudulent appropriation, it was only when he handed the \$7,000 to the appellant that he was guilty of any crime; that consequently the appellant, if guilty at all, was also guilty of fraudulent appropriation and cannot be indicted as a receiver; that he ought to have been found guilty of the fraudulent appropriation, or acquitted, and that the jury had no right to bring a verdict of guilty on the second count of the indictment for receiving. On that point the judges in the Court below were unanimous in holding the appellant's contention unfounded.

The facts that bear on this point, though appearing in the reserved case, may perhaps be recapitulated here.

Dalrymple was appointed trustee or executor of two estates; one his father's, the other his mother's.

As such trustee he had in his possession a sum of \$1,812.82, which up to the month of November, 1887, was deposited in one of the banks in his own name. On 10th November, 1887, he drew this money out of the bank. On 15th November, 1887, having collected a certain sum due the estate by one Magnan, the heirs were called together and each received his portion of this sum. Dalrymple did not divide the \$1,812.82 which he had drawn from the bank. There was a sum of \$5,375 falling due, by one Brennan, to the heirs, a few days after the division of the Magnan money, and the heirs granted a notarial discharge to Brennan and Dalrymple for this sum, and gave a verbal authorization to Brennan to pay the money to Dalrymple, and to Dalrymple to receive the money from Brennan. At the time of the division of the Magnan money, some of the heirs objected to the appellant receiving as large a share as he did. A disagreement arose and the appellant and Dalrymple walked home from the notary's office together. They then agreed to a scheme by which Dalrymple should appropriate the money to be paid by Brennan and defraud the other heirs. Several interviews took place, between the date of the division of the Magnan money and the receipt of the Brennan money by Dalrymple, and it was agreed between them, that when Dalrymple should receive this money he would hand it to the appellant for safe keeping and abscond to the United States. This arrangement was fully carried out. Brennan paid Dalrymple \$5,465 by check on 19th November, 1887. Dalrymple cashed the check; handed the difference between the amount due by Brennan, \$5,375, and the amount of the check back to Brennan; went to the Windsor Hotel; purchased a ticket for New York; went home, took the \$1,812.82 and made up a parcel of \$7,000 out of this and the balance of \$5,375; took this parcel to appellant's store, as previously arranged, and handed it to him saying: "Here is the boodle, take good care of it." On the same evening he absconded to New York.

Upon this evidence, I am of opinion, with the Court below, that there was a fraudulent appropriation by Dalrymple previous to his handing over the money to McIntosh.

Whether the appropriation took place only at the very last second before he handed the boodle, as he termed it, to McIntosh, or by any of his previous acts, it is immaterial. If it was then and there boodle the fraudulent appropriation had preceded. But, even if it could be said that the appropriation took place only by the handing over the money, that would be sufficient. The same act then constituted a fraudulent appropriation by Dalrymple, and a fraudulent receiving by McIntosh. The case of *Reg. v. Roberts*, 3 Cox 74, would appear to be an authority for the proposition that there was no fraudulent conversion by Dalrymple on the facts proved till he handed over the money to McIntosh so as to constitute larceny, if the relation between them had been that of master and servant. But that case is based on the peculiar requisites of the conversion necessary at common law to constitute larceny, the doctrine whereof cannot be extended to the statutory offence provided for by sec. 85 of the Larceny Act.

I think the conviction was right.

After verdict the Court is bound to resort to any possible construction which would uphold an indictment against a purely technical objection as was held in *Reg. v. Craddock*, 2 Den. 31, on a verdict for receiving when the accused had, as here, been found not guilty on two first counts for stealing. It is legal by an express statutory enactment to charge a stealing and a receiving in the same indictment. There is consequently no such repugnancy in the present case as was contended for by the appellant: *Reg. v. Huntley*, Bell C.C. 238. Where a prisoner is charged in two counts with stealing and receiving, the jury may return a verdict of guilty on the latter count, if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing: *Reg. v. Hilton*, Bell C.C. 20.

An indictment may charge the prisoner, in two counts, with being an accessory before the fact and accessory after the fact: *Rex. v. Blackson*, 8 C. & P. 43.

A person having a joint possession with the thief may be convicted as a receiver: *Reg. v. Smith*, Dears. 494; *Reg. v. Wiley*, 2 Den. 37; sec. 317, Crim. Code. And in the same case, a conviction for a receiving is good, although a conviction for stealing would have been supported by the same evidence if the jury had so found.

Dalrymple might have been acquitted and yet McIntosh found guilty. And an accessory before the fact may also be a receiver: *Reg. v. Hughes*, Bell C.C. 242; *Reg. v. Pulham*, 9 C. & P. 280; *Reg. v. Burton*, 13 Cox. 71; though a principal cannot be: *Reg. v. Coggins*, 12 Cox. 517; except under the circumstances mentioned in Greaves' note to *Reg. v. Perkins*, 2 Den. 459, in 1st Russ. 53. And here, McIntosh, though not a principal in the ordinary sense of the word, was an accessory before the fact, for it is settled law that, although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence was committed, are not principals but accessories before the fact: *Reg. v. Soares*, R. & R. 25; *Reg. v. Davis*, R. & R. 113; *Reg. v. Else*, R. & R. 142; *Reg. v. Tuckwell*, Car. & M. 215. But as accessory before the fact he was liable to be indicted and punished as a principal: *Reg. v. James*, 17 Cox. 24; sec. 61 Code.

In a note to *Reg. v. Langmead*, L. & C. 427, where the prisoner was found guilty of receiving only, though also charged with the larceny, Greaves says:

"A clearer case of this there never was; the sheep were proved to have been in possession of the son, and the prisoner received them; and there was abundant evidence of guilty knowledge, and it was perfectly immaterial whether the prisoner had previously stolen them, for a man may be a thief, and a receiver as well. There was also evidence that he either stole, or was an accessory before the fact to the stealing."

Now, here also, there is evidence that McIntosh was an accessory before the fact to the fraudulent appropriation, and therefore a principal, as in misdemeanours all are principals, and he was rightly charged as such in the first count of the indictment. But why was a verdict of guilty on the count for receiving not legal because the jury found him not guilty on the first count, as it was in Langmead's case or Hughes' case, or the other cases above cited?

He cannot argue that he became a principal only when he received the money; he was, in law, a principal before that.

I would dismiss the appeal.

GWYNNE, J. (dissenting):—In the month of September, 1893, the appellant was convicted in the District of Montreal upon a count in an indictment which charged him as follows:

“And the Jurors aforesaid, upon their oath aforesaid do further present: that the said Alexander McIntosh on the nineteenth day of November, in the year of our Lord one thousand eight hundred and eighty-seven, at the City of Montreal in the District of Montreal, unlawfully did receive a certain sum of money, to wit, the sum of seven thousand dollars, the property of Mary Dalrymple, Ellen Dalrymple, Caroline Dalrymple and George Dalrymple, which said sum of money, to wit, said sum of seven thousand dollars had before then been unlawfully obtained and taken and appropriated by one James Dalrymple, the obtaining and the taking of which sum of money, to wit, of said sum of seven thousand dollars by the said James Dalrymple, as aforesaid, is made a misdemeanour in and by virtue of section eighty-five, chapter one hundred and sixty-four, of the Revised Statutes of Canada, he (said Alexander McIntosh) at the time when he so received the said sum of money, to wit, the said sum of seven thousand dollars, as aforesaid, well knowing the same to have been so unlawfully appropriated, obtained and taken by the said James Dalrymple as aforesaid.”

Upon the verdict of guilty upon the charge contained in this count being rendered, counsel for appellant applied for a

reserved case upon certain points stated by him. His application was refused by the learned Judge who tried the case, and thereupon application was made to the Attorney-General, under sec. 744 of 55 & 56 Vict. ch. 29, for leave to appeal, which having been granted, a case was stated to the Court of Queen's Bench, appeal side, Montreal, under the provisions of the third subsection of said sec. 744. The case so stated had appended thereto as part thereof the evidence upon which the verdict was rendered, and submitted for the opinion of the Court of Appeal the two following questions:—

“1st. Whether, under the circumstances, the prisoner has been rightfully convicted of the crime of unlawfully receiving the sum of \$7,000 from James Dalrymple, knowing it to have been previously unlawfully taken and misappropriated, inasmuch as James Dalrymple was the bailee of such money and only parted with it when he handed it to him.

“2nd. Whether the prisoner could be found guilty of unlawfully receiving money of which he was part owner for an undivided share, inasmuch as the money was the undivided property of the heirs Dalrymple, of whom he represented one.”

The majority of the Court of Queen's Bench in appeal, the Chief Justice dissenting, were of opinion that the conviction was good, and therefore affirmed it and dismissed the appeal. From that judgment the present appeal is taken.

The count upon which the appellant has been found guilty is plainly framed under sec. 83 of the Dominion Act, 49 Vict. ch. 164, namely, that he had received from James Dalrymple the sum of, to wit, \$7,000, which at the time of receiving it the appellant well knew that the said James Dalrymple had, previously to the appellant receiving the money from him, unlawfully appropriated, taken and obtained. Now the moneys handed by Dalrymple to the appellant were received by James Dalrymple in his character of testamentary executor of an estate in which the said James Dalrymple and the appellant and others were jointly interested as part owners. The money

was therefore lawfully obtained by James Dalrymple, and so long as it remained in his possession, was there lawfully, whatever intention he may have entertained in virtue of a conspiracy with the appellant or otherwise to misappropriate it, for what the law makes criminal is the act done in pursuance of the criminal intention, not the mere intention not followed by an act to carry such intention into effect.

Until, therefore, James Dalrymple parted in some manner with the money of which he was lawfully in possession the appellant could not be guilty of the offence with which he is charged of having received from Dalrymple money which at the time of his receiving it he well knew that Dalrymple had previously unlawfully obtained or appropriated. If the handing of the money to the appellant constituted the appropriation which made Dalrymple guilty of the offence which he is alleged in the count against the appellant to have committed, then the count against the appellant cannot be maintained for the offence committed by Dalrymple, with the knowledge of the previous committal of which the appellant is charged in the count, must be one which had been committed before ever Dalrymple handed the money to the appellant. However guilty the appellant may be under the evidence of some offence against the criminal law in the matter, it is plainly not that charged in the count upon which he has been found guilty, for there is no evidence of any misappropriation of the money handed by Dalrymple to the appellant until the money was so handed. Neither the pre-arranged agreement between Dalrymple and the appellant as to the appropriation of the money to which Dalrymple has testified, nor his misappropriation, if any there was, of other money belonging to the estate of which he was such testamentary executor, can be of any consequence upon a count which charges that the appellant received the money which he did receive from Dalrymple well knowing that Dalrymple had previously unlawfully appropriated, obtained or taken it.

I am of opinion, that the evidence fails wholly to establish

such charge, and therefore that this appeal must be allowed, and that the conviction must be quashed.

Appeal dismissed with costs.

Note:—Theft—Receiver controverting guilt of principal.

Where the principal and receiver are joined in the same indictment and tried together, the receiver may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal. 2 Russell Cr., 4th ed., 571.

Where the principal has been previously convicted, though the record of the conviction will be sufficient presumptive evidence that everything in the former proceeding was rightly and properly transacted, yet it is competent to the receiver to controvert the guilt of the principal, "and to show that the offence of which he was convicted did not amount to a felony in him, or not to that species of felony with which he was charged." 2 Russ. Cr. 4th ed., 571; Fost. 365; *Smith's case*, 1 Leach 288; *Rea v. Dunn* (1831), 4 C. & P. 377. In the latter case Bosanquet, J., thought that the record of the principal's conviction on his own confession was *prima facie* evidence against the accessory; but where two persons were indicted together, the one for stealing and the other for receiving, Wood, B., refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver. *Anon*, cited in *Rea v. Turner*, R. & M. C.C. 347, 1 Lewin C.C. 119.

Upon an indictment against an accessory, a confession by the principal is not admissible to prove the guilt of the principal; it must be proved *aliunde*, especially if the principal be alive, and could be called as a witness; and it seems that even the conviction of the principal would not be admissible to prove the guilt of the principal. The prisoner was indicted for receiving sixty sovereigns, which had been stolen by S. Rich. A confession by S. Rich, made before a magistrate in the presence of the prisoner, in which she stated various facts implicating the prisoner, was tendered in evidence. Patteson, J., refused to receive anything that was said by S. Rich respecting the prisoner, but admitted what she said respecting herself only. S. Rich had been found guilty on another indictment, but had not been sentenced, and might have been called as a witness. The judges were unanimously of opinion that Rich's confession was no evidence against the prisoner; and many of them appeared to think that had Rich been convicted, and the indictment against the prisoner stated not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means. *Rea v. Turner*, R. & M. C.C.R. 347, 1 Lewin 119. And upon the authority of this case, where an accessory before the fact to a murder was tried after the principal had been convicted and executed, Parke, B., ordered the proceedings to be conducted in the same manner as if the principal was then on his trial, and the evidence against the accessory was not gone into until the case against the principal was concluded. *Ratcliffe's case*, 1 Lewin 121.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J.Q.B., FALCONBRIDGE AND STREET, JJ., SITTING
AS A COURT FOR CROWN CASES RESERVED.

THE QUEEN v. UNGER.

Theft by agent—Fraudulent conversion—Money received on terms requiring the receiver to account therefor to a third party—"Received on terms," meaning of—No terms imposed by party paying—Terms of holding after receiving—Cr. Code sec. 308.

1. The fraudulent conversion by an agent of money received by him upon the account of his principal is punishable under Code sec. 308 although no terms requiring him to account for or pay the same to the principal were imposed by the party paying.
2. Where the person receiving the money thereupon holds it on terms arranged between himself and a third party to whom the money belongs requiring him to account for or pay the same to such third party, such money is money "received on terms requiring him to account for or pay the same," etc., within Code sec. 308.

DECIDED: May 31, 1894.

Crown case reserved. The defendant had been indicted and convicted for that he, having received from one Snelgrove the sum of \$338.46, the property of one Scott, on terms requiring him to account for or pay over the money to Scott, did fraudulently convert the same to his own use.

The prosecution was had under sec. 308 of the Criminal Code 1892, which is as follows:—

308. Every one commits theft who, having received any money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security or other thing received, fraudulently converts the same to his own use; or fraudulently omits to account for or pay the same or any part thereof, or to account for or pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid.

(2) Provided, that if it be part of the said terms that the

money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same, and that such last mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of such money or proceeds, or any part thereof, in such account, shall be a sufficient accounting for the money, or proceeds, or part thereof so entered, and in such case no fraudulent conversion of the amount accounted for shall be deemed to have taken place.

TORONTO, May 31st, 1894.

W. R. Riddell, for the defendant, contended that as no terms had been imposed by Snelgrove the party from whom the money was received, that sec. 308 did not apply.

J. R. Cartwright, Q.C., for the Crown, was not called upon.

THE COURT held that the reference in sec. 308 of the Code to the terms on which the money was received means the terms on which the defendant holds the money when he has received it, and that the section is not restricted to cases where the terms are imposed by the person paying the money.

Conviction affirmed.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE ARMOUR, C.J.O., MACLENNAN, MOSS AND LISTER, JJ.A.

THE KING v. MORGAN (No. 2).

Summary trial—Using record of conviction in lieu of warrant of commitment—Habeas corpus—Leave to put in formal commitment—Order for detention—Theft from the person—Effect of consent to summary trial—Convicting for attempt only—Describing the offence—"Picking the pocket"—Proceedings preliminary to election of mode of trial under sec. 783—Cr. Code secs. 344, 611, 711, 752, 783, 785, 786.

1. Where there has been a valid conviction on a summary trial by a magistrate, and the accused has been imprisoned thereunder without a formal warrant of commitment, in lieu of which the original record of conviction was delivered to the gaoler, the Court may on habeas corpus allow a formal commitment to be lodged, and direct the detention of the prisoner in the meantime under sec. 752.
2. The provision of sec. 711 of the Code that when the complete commission of the offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt applies to summary trials before city and town police magistrates under sec. 785 of the Code, as well as to trials upon indictment.
3. On a summary trial before the police magistrate of a city or town under sec. 785 of the Code, the consent of the accused to be tried summarily is to be taken as a consent to a summary trial for whatever offence he might be found guilty of at a Court of General Sessions were he being there tried on a like charge.
4. *Per ARMOUR, C.J.O.*:—An indictment for an attempt to commit theft from the person would be sufficient if it charged that at a specified time and place the accused did attempt to "pick the pocket" of a person named (Sec. 611).
5. *Per MOSS, J.A.*:—On a "summary trial" proceeding before a "magistrate" under sec. 783 for theft under the value of \$10, the magistrate must, before he asks the accused the statutory question as to whether or not he consents to summary trial, satisfy himself, firstly, that the property is alleged to have been stolen, and, secondly, that the value does not exceed \$10.
6. *Quære*, whether a magistrate trying a case summarily under sec. 783 and not under sec. 785, on a charge of theft where the value is under \$10 could convict for an attempt.

The King v. Morgan (1901), 5 Can. Cr. Cas. 63, affirmed.

ARGUED: December 5, 1901.

DECIDED: December 19, 1901.

THIS was an appeal from the judgment of Street, J., reported ante, p. 63.

The prisoner on the 19th June, 1901, was charged before the police magistrate of the town of Barrie that he did on the 15th June, 1901, pick the pocket of a woman named Salter, "and did steal from her person a sum of money."

On the prisoner being brought before the magistrate he elected to be tried summarily, and was remanded for trial until the 24th June, 1901.

On the 24th June he was tried before the magistrate and convicted of having "attempted to pick the pocket," and was sentenced to be imprisoned in the Central Prison at Toronto, and there kept at hard labour for the term of six months.

The conviction recited the charge and that the prisoner elected to be tried summarily.

On the defendant being taken to the Central Prison, in pursuance of the terms of the conviction, a conviction signed and sealed by the magistrate, as above stated, was lodged with the jailor of the Central Prison, as the warrant for his detention there.

Writs of *habeas corpus* and *certiorari* were issued, under which the depositions taken before the magistrate upon the trial, as well as the information, were brought up on the *certiorari*, and the jailor of the Central Prison brought up the prisoner with the warrant for his detention.

The prisoner's discharge was moved for on the grounds: (1) that having elected to be tried summarily on the charge of stealing from the person he could not be convicted of merely attempting to do so; (2) that there had been no proper warrant issued; and (3) that no offence was described in the conviction.

The learned Judge refused to grant the discharge.

From this judgment the prisoner appealed to the Court of Appeal.

TORONTO, December 5th, 1901.

J. E. Jones, for the prisoner: The defendant was charged with theft under sec. 783 of the Criminal Code, 55 & 56 Vict.

ch. 29 (D.), and he elected to be tried summarily on such charge, and was prepared to meet it. If the prisoner was not to be tried for such an offence, but for the attempt to commit the offence, then, under sec. 773, a charge therefor should have been drawn up and preferred against him: *Rez v. Dungey* (1901), 5 Can. Cr. Cas. 38, 1 O.L.R. 224. Section 711 does not authorize the conviction, for that section only applies to jury trials. A warrant of commitment should have been issued. The judge before whom a prisoner is brought upon a writ of *habeas corpus* has no power to order the detention of the prisoner; and therefore Mr. Justice Street acted without jurisdiction in making such order. No offence is described in the conviction. The charge of "picking the pocket" is not an offence. The charge should have been, the attempt to commit theft, or stealing from the pocket: *Watts v. Rymes* (1673), 2 Lev. 51; *Re Beebe* (1863), 3 P.R. 270.

J. R. Cartwright, K.C., Deputy Attorney-General, for the Crown: There is no necessity to rely on sec. 783. The conviction can be sustained under sec. 785. The offence was clearly one which could have been tried at the court of general sessions, and, therefore, with the prisoner's consent was triable before the magistrate. Section 711 which applies to all trials and not merely to jury trials, and which must be read in connection with sec. 783, provides for a conviction for an attempt to commit the offence. No warrant of commitment was necessary: sec. 798. The objection, however, is met by the order of the learned Judge directing the prisoner's detention. The charge stated in the conviction is perfectly good. "Picking the pocket" is a well known term, and means "theft" or "stealing" from the pocket: *Harris's Criminal Law*, 8th ed., 217; *Bishop's Criminal Law*, 7th ed., vol. i., sec. 743. See also sec. 611. The defendant was in no way misled by the form of the charge.

TORONTO, December 19, 1901.

ARMOUR, C.J.O.:—The prisoner was charged before a police

magistrate with having picked the pocket of a woman, and with having stolen from her person a sum of money.

This was an offence for which the prisoner might have been tried at a court of general sessions of the peace, and he might with his own consent have been tried before the said police magistrate, and might have been sentenced to the same punishment as he would have been liable to had he been tried before the court of general sessions of the peace: Criminal Code, sec. 785; *Regina v. Conlin* (1897), 29 O.R. 28, 1 Can. Cr. Cas. 41.

The prisoner having been brought before the said police magistrate, charged as aforesaid, and having consented to be tried summarily, was so tried by the said police magistrate, and was convicted of an attempt to pick the pocket of the said woman, and was by the said police magistrate adjudged to be imprisoned in the Central Prison at Toronto, and there kept at hard labour for the term of six months.

Section 711 of the Criminal Code provides that "when the complete commission of the offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly;" and this provision plainly applies to the summary trial of indictable offences.

And when the prisoner consented to be tried summarily upon the said charge, he must be taken to have assented to be tried summarily for whatever offence he might properly be found guilty of upon the said charge, and having been properly found guilty upon the said charge of an attempt to commit the offence charged, he must be held to have been legally convicted upon the said trial.

An indictment in the terms of the conviction for attempting to pick the pocket of a person would seem to be sufficient under the provisions of sec. 611 of the Criminal Code, and if so the conviction should be held to be sufficient.

The case of *Watts v. Rymes* (1673), 2 Lev. 51, relied on in support of the objection to the conviction, cannot now be considered law: Odger's Law of Libel, 3rd ed., 68, 131.

If a formal commitment were necessary the learned Judge did right, there being a valid conviction, in allowing a formal commitment to be lodged.

As to whether there was any necessity for a formal commitment, see *Barne's case* (1676), 2 Rolle's Reports 157; *Brass Crosby's case* (1771), 3 Wils. 188; *Rex v. Clerk* (1697), 1 Salk, 349; *Rex v. Suddis* (1801), 1 East 306; *Leonard Watson's case* (1839), 9 A. & E. 731.

In my opinion the appeal must be dismissed.

Moss, J.A.:—It is not necessary for the determination of this appeal to decide whether a person charged with theft in a case falling under sub-sec. (a) of sec. 783 of the Criminal Code may upon his consenting to be tried upon that charge be properly convicted of having attempted to commit theft under sub-sec. (b) without the charge being made or his consent to be tried therefor obtained. And I do not wish to be understood as agreeing that a magistrate has power so to deal with the case.

This case does not appear to have been dealt with at all under sec. 783 (a), for under it before the magistrate could put the question to the accused whether he consented to be tried summarily he had to satisfy himself, first, that property was alleged to have been stolen; and, secondly, that, in his judgment, the value did not exceed \$10. And this he could not do, for nothing was shewn as to the value of the property alleged to have been stolen, except the statement in the information that the value was unknown.

The accused appears to have given his consent before any testimony was taken, and the proceedings seem to have been under sec. 785 of the Code as it is now to be read by virtue of 63 & 64 Vict., ch. 46 (D.). And I think that the conviction in this case may be sustained on the ground that the prisoner was charged before a police magistrate with an indictable offence for which he might be tried at a court of general sessions of the peace: Criminal Code, sec. 344; and that the language

of sec. 785 of the Code, as it now reads by virtue of 63 & 64 Vict., ch. 46, is wide enough to enable a police magistrate proceeding thereunder to find the accused, who is being summarily tried with his own consent, guilty of whatever offence he might have been convicted of, and amenable to whatever punishment he would have been liable to, if he had been tried at the general sessions.

The appeal therefore fails.

MACLENNAN and LISTER, JJ.A., concurred.

Appeal dismissed.

Note:—Sentences and commitments on summary trials.

A conviction under Part LV. relating to Summary trials is declared by sec. 798 of the Code to "have the same effect as a conviction upon indictment" for the same offence. The Code forms having particular reference to Summary trials are three in number, viz., QQ of conviction, RR of conviction upon a plea of guilty, and SS of certificate of dismissal. Section 801, however, provides that the magistrate adjudicating under the provisions of Part LV. shall transmit the conviction, etc., to the clerk of the peace or other proper officer, to be kept among the records of the court. From this, it seems clear that the original conviction should not be delivered to the gaoler as the latter's authority to imprison the convicted party. A warrant of commitment after sentence is not always necessary to sustain the imprisonment, for the sentence itself may be a sufficient justification of the imprisonment. But the warrant is always advisable for the protection of the gaoler, in anticipation of habeas corpus proceedings, by giving him a document in due form, which he can include in his return to the writ as his authority or warrant for the detention. The person in whose custody the convicted person is placed in execution of his sentence cannot be taken to be cognizant of all the proceedings. It is enough that the court had authority to award such a sentence. He returns the cause for which he detains the party in custody, namely, the judgment of such a court. *R. v. Suddis* (1801), 1 East. R., 306, 316, per Lawrence, J. In the same case *Le Blanc*, J., said:—"The principal question is, whether a party who is in custody, under the sentence of a court of competent jurisdiction, and is brought up here upon a writ of habeas corpus, be entitled to his discharge on the ground that it does not appear upon the face of the return that certain facts existed which are contended to be necessary to warrant such a sentence. . . . It seems to me to have been intended to give the court-martial a discretionary power of inflicting punishment on the offender, having regard to the enormity of the offence. This gets rid of

Note:—Continued.

the objection as to the principal not appearing to have been convicted. But another objection is, that it does not appear that the party was charged with the offence of which he was convicted. To which the answer is, that it is sufficient for the officer having him in his custody to return to the writ of habeas corpus, that a court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence." 1 East. R. 317.

In *Rex v. Clerk* (1697), 1 Salkeld's Reports, 349, it was laid down by the King's Bench that, where a commitment is in court to a proper officer there present, there is no warrant of commitment, and therefore he cannot return a warrant *in hæc verba*, but must return the truth of the whole matter under peril of an action. But, if he be committed to one that is not an officer (in that case the keeper of Newgate, who was in fact an officer of the city of London, of which fact the court could not take judicial notice), there must be a warrant in writing, and where there is one it must be returned on habeas corpus, "for otherwise it would be in the power of the gaoler to alter the case of the prisoner, and to make it either better or worse than it is upon the warrant; and if he may take upon him to return what he will, he makes himself judge, whereas the court ought to judge and that upon the warrant itself."

The return to a habeas corpus *prima facie* imports verity, and it need not be supported by affidavits. Leonard Watson's case (1839), 9 Ad. & El. 731, 794. In the latter case persons convicted of treason in Upper Canada and pardoned conditionally on being transported to Van Dieman's Land, took out writs of habeas corpus in England, while under detention there en route to the place of transportation, but were remanded to custody.

In *Rex v. Marks*, 8 East. 157, the accused had been committed for trial by magistrates for a felony, and on a habeas corpus and objection taken to the warrant of commitment as insufficiently specifying the offence, it was held that, though a warrant of committal for trial for felony be informal, yet if upon the depositions returned the court see that a felony has been committed, and that there is a reasonable ground of charge against the prisoners, the court may properly remand them or may recommit them in due form while discharging them from their imprisonment under the defective warrant, the latter course being sometimes adopted by the Crown to obviate a renewal of the habeas corpus before another judge on the same grounds. See 3 East's Rep. 166.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE MACDONALD, C.J., WEATHERBE AND TOWNSEND, JJ.,
GRAHAM, E.J., AND MEAGHER, J.

THE KING v. MacDONALD (No. 2).

Summary conviction—Proceedings certified on habeas corpus application without certiorari—Discharge on habeas corpus—Subsequent motion to quash conviction—Jurisdiction of Superior Court—Canada Temperance Act—Second and third offences.

1. A motion to quash a summary conviction cannot be entertained by a Superior Court without a writ of certiorari for that purpose and a return to such writ.
2. Where on a habeas corpus application the magistrate is directed by an order to return the proceedings relating to the imprisonment and thereupon returns under such order the information, depositions and conviction, such conviction is not by reason thereof brought under the jurisdiction of the Superior Court for the purpose of a motion to quash the same.
3. The mere fact of judicial proceedings before inferior tribunals being on the files of a Superior Court certified or verified for use as evidence by the same officer who would make the return to a writ of certiorari to bring them up, does not bring the matter or cause into the Superior Court.

ARGUED: December 7 and 9, 1901.

DECIDED: May 6, 1902.

Motions on notice to the prosecutor and convicting magistrate to set aside two convictions made against the defendant William MacDonald on May 18th and October 29th, 1901, by George H. McKay, stipendiary magistrate in and for the county of Pictou, for a "second" and "third" offence against the second part of the Canada Temperance Act, under which penalties of \$100 and fifty-six days' absolute imprisonment, respectively, were inflicted.

These convictions at the time of the making of this motion were on the files of the Court, having been brought there under an order of Townsend, J., in aid of habeas corpus proceedings, under which the defendant was discharged from jail in respect of the conviction for the "third" offence. See *The King v. MacDonald*, ante, p. 97, where all the details of these convictions, etc., are stated.

The grounds on which the motion was made to set aside the conviction for the "second" offence were as follows:—

1. Because the said conviction for a second offence sought to be quashed herein was made by the convicting justice without any jurisdiction and in contravention of sec. 104 of the Canada Temperance Act as amended by ch. 34 of the Acts of the Parliament of Canada for the year 1888.

2. Because the information on which the said conviction sought to be quashed herein made was laid before and taken by Alexander McHardy, stipendiary in and for the county of Pictou, and the conviction founded on the said information, and which is sought to be set aside herein, was had before George H. McKay, stipendiary magistrate in and for the county of Pictou, in contravention of the first above mentioned statute.

3. Because the said George H. McKay, stipendiary, who made the said conviction sought to be quashed herein, was a justice other than the stipendiary magistrate before whom the prosecution for such conviction was brought.

And the grounds on which the motion was made to set aside the conviction for the "third" offence were as follows:—

1. Because the said conviction for a third offence sought to be set aside herein is bad in law, inasmuch as the conviction for a second offence, referred to in the record of conviction for said third offence, is void by reason of the justice who made the said conviction for a second offence, being a justice other than the stipendiary magistrate before whom the information for said second offence was laid.

2. Because said conviction for a third offence was made without jurisdiction for the reason alleged in the foregoing objection.

3. Because the said conviction for a third offence was made in excess of jurisdiction for the reason alleged in objection 1.

HALIFAX, December 7 and 9, 1901.

Dr. Russell, K.C., and J. J. Power, for the defendant.

W. B. A. Ritchie, K.C., and Struan G. Robertson, for the prosecutor and magistrate, contra.

Ritchie, K.C., took a preliminary objection that the Court had no power to quash these convictions, as they were not returned to the Court under a writ of certiorari issued at the instance of the defendant, and under the conditions required by the practice of the Court.

The Court, having heard this preliminary objection argued, reserved judgment thereon and directed the applications to be argued on the merits.

HALIFAX, May 6, 1902.

The judgment of the majority of the Court was delivered by

GRAHAM, E.J. :—

A stipendiary magistrate has made a conviction under the Canada Temperance Act, dated the 18th of May, 1901, for a "second" offence, and there is another for a "third" offence dated October 28th, 1901.

Under the "third" conviction the defendant was imprisoned, and under proceedings taken under the provisions of Revised Statutes, ch. 181, relating to the liberty of the subject, he was discharged by a Judge.

Section 3 of that chapter provides that in a case in which it would be inconvenient to bring up the body, instead of a habeas corpus, an order may be applied for, addressed to the keeper of the prison commanding him to make a return of the cause of imprisonment.

Section 5 provides as follows:—

(1) "Upon return to such order the court or judge may proceed to examine into and decide upon the legality of the imprisonment and make such order, require such verification, and direct such notices or further returns in respect thereto as are deemed necessary or proper for the purposes of justice."

(2) "The Court or the Judge . . . may require the

immediate discharge of the prisoner, or may direct his bailment in such manner and for such purpose and with the like effect and proceeding as is allowed upon habeas corpus."

Section 7 provides as follows:—

"In all cases, whether under statute or at common law or under the provisions of this chapter, the Court or a judge may require the production of all such proceedings, documents and papers relating to the matter in question before whomsoever and in whose possession soever they are, as to the Court or judge appear necessary for the elucidation of the truth, and may also examine into the truth of the return to any writ of habeas corpus or order granted under this chapter in the same manner as such examination is provided for in cases under 'The Act of Parliament 56 George III., ch. 100.' "

The two convictions were sent up by the stipendiary magistrate in obedience to an ex parte order made by Mr. Justice Townshend, dated November 14th, 1901, which, under the sections I have mentioned, contained a direction to the jailor to return the cause of imprisonment, and also a direction to the stipendiary magistrate in the following terms:—

"AND I DO FURTHER ORDER that George H. McKay, Esq., stipendiary magistrate in and for the county of Pictou, do, on being served with a certified copy of this order, forthwith return to me *all the proceedings, documents and papers in his possession relating to the imprisonment of the said William MacDonald, in the county gaol at Pictou aforesaid, together with this order.*"

A certified copy was served on the magistrate, and the return made by him on this copy is as follows:—

"The execution of this order appears by the schedules hereunto annexed.

"(a) Information for third offence, etc., etc.

"The answer of George H. McKay, Esq., stipendiary magistrate in and for the county of Pictou.

"Dated the 15th day of November, A.D. 1901.

"(Signed) GEORGE H. MCKAY, (L.S.)

“Stipendiary Magistrate in and for the County of Pictou.”

The title of the order granted by the latter judge as well as that of the learned Judge who discharged the defendant, and of all the proceedings before them, is as follows:—

“In the matter of ch. 181 of the Revised Statutes of Nova Scotia, 1900

“And in the matter of the application of William MacDonald, a prisoner in the common jail at Pictou, for discharge from custody therein under the provisions of the said chapter.”

The motion came before Mr. Justice Ritchie, sitting for Mr. Justice Townshend, and he refused to discharge the defendant. Thereupon a fresh application was made to another judge for an order addressed to the jailor to return the cause of imprisonment, and on that application the order of and return made to Mr. Justice Townshend were apparently read.

These two convictions are on file in the proceeding for the order to send up the cause of imprisonment. The defendant having obtained his discharge, has in respect to each conviction given a notice of motion to quash. It is entitled:—

“His Majesty the King, on the information of James L. Waters, plaintiff, and William MacDonald, defendant.”

The motion is made on reading an affidavit of the defendant so entitled, and “the order of Mr. Justice Townshend with the return thereto.”

And the defendant is moving the Court to quash each conviction just as if it had been brought into Court by a writ of certiorari issued in respect to it.

The Crown rules from 27 to 37 relate to the practice to be observed in respect to the writ of certiorari.

(1) A four days’ notice of the application must be given to the opposite party and also to the magistrate in order that either may shew cause.

(2) A recognizance with two sureties in the sum of \$200 must first be filed to respond the judgment, and additional security may be ordered.

(3) Such writ shall be applied for within six months after a conviction.

(4) No order for a certiorari shall be made unless a copy of the conviction to be attacked is produced, verified by affidavit.

(5) No objection on account of any mistake or omission in a judgment or order brought up by writ shall be allowed unless the omission or mistake was specified in the notice of motion for the writ.

Then it is provided by the Canada Temperance Act, sec. 119, that no conviction in respect of any offence shall be removed by certiorari or otherwise into any of His Majesty's Courts of Record.

By R.S.N.S. ch. 40, sec. 6, it is provided "that no action, etc., shall be brought for anything done under a conviction or order until such conviction or order is quashed."

The illegality on which the "second" conviction is attacked is this: This "second" conviction was made before a stipendiary magistrate who was requested to sit for and in the place of the stipendiary magistrate who took the information and issued the summons.

Provision is made for one stipendiary magistrate sitting for another under the Provincial Act, R.S.N.S. 1900, ch. 33, sec. 8.

It is contended that the Canada Temperance Act, R.S.C. ch. 106, sec. 104 (amended by 1888, ch. 34, sec. 8), providing that "if any prosecution is brought before any such . . . stipendiary magistrate . . . no other justice shall sit or take part therein," is to be construed in such a way as to control the provisions in the Provincial Act.

In respect to the "third conviction," it was a "third conviction" by reason of the "second conviction," which was put in evidence at the later trial, and it is contended that the "second" being bad, the "third" is bad for that reason; that we can go not only behind the last conviction, but also behind the second one used in evidence, and although good on its face attack it in this collateral way and determine that if we find it

bad that the last one is therefore also bad; in effect holding that the stipendiary magistrate when the conviction was tendered in evidence could have then and there tried whether it was validly made or not.

It appears that before any of these applications, viz., on the 11th June, 1901, an application was made to a judge for a writ of certiorari to remove into this Court this same "second" conviction to quash it, and that after hearing the parties the application was dismissed. And it is objected that a second application could not be entertained.

A preliminary objection was taken by the prosecutor to this application on the ground that there being no writ of certiorari and return thereto, the Court could not quash the convictions. The matter was not properly before it. To this the answer was made that the order to bring up the convictions was in the nature of a writ of certiorari, and that it had been held in Ontario that the Court might quash the conviction if the certiorari had been granted merely for the purpose of bringing up the convictions for the information of the judge in the habeas corpus proceeding.

The distinction between a writ of certiorari to bring up from an inferior Court records to be used in connection with proceedings in the Court above and a writ of certiorari to remove a cause into the King's Bench in order that the same might be determined there, or to quash the judgment or conviction for error, is well marked.

It must be remembered that all records, with one or two exceptions, could only be brought from inferior tribunals into the King's Bench by means of a writ of certiorari; and that a writ of certiorari was also a useful writ for compelling inferior tribunals to send up these records when required: *Comyn's Digest*, Certiorari *a*; *Bacon's Abridgment*, Certiorari *c*.

A party could not subpoena the officer of the other Court to produce original records.

When the record of an inferior Court was pleaded in a

Superior Court, and there was a plea of nul tiel record, a certiorari was used to remove the record to be used as evidence in the Court above. But the cause was not brought up so that the Court above could exercise jurisdiction in it. Generally the certiorari required only the tenor of the record in such a case, and that was sufficient evidence in the Court above.

In 4 Viner 340, Certiorari c, it is said, "Where the Court which awards the certiorari cannot hold plea upon the record, there only a tenor shall be certified, because otherwise, if the record itself should be removed there would be a failure of right afterwards."

And in *Woodcroft v. Kinaston*, 2 Atk. 318, the Lord Chancellor said: "There is another difference between certioraris themselves. This present writ was framed, I believe, from certioraris brought for another purpose, for the precedents found in the cursitor's book which I looked into are such, and they are in order only to use the record as evidence, for if nul tiel record be pleaded the Court cannot have the record up by certiorari and then the tenor if returned is sufficient as evidence of the record and will countervail the plea of nul tiel record. But when the record is to be proceeded upon, the record itself must be returned."

There was also this use of the writ. The Court above, when a commitment was returned to a writ of habeas corpus, might, if it was a bad commitment, look at the depositions, and if they disclosed a crime the prisoner would not be discharged. Or, the depositions might be required to enable the defendant to be released on bail, and a certiorari was resorted to for bringing them up for such a purpose: *Rex v. Marks*, 3 East 157. But they were only used as evidence, and no action was taken in respect to the depositions themselves or the certiorari which brought them up.

Then, where there was a bad commitment and the defendant wished to shew that the conviction which supported it was also bad, or there was a defect of jurisdiction behind it, he applied

not only for a writ of habeas corpus to the keeper of the prison, but also for a writ of certiorari to bring up the proceedings from the inferior tribunal in order to have the Court examine into the validity of the imprisonment. There it was spoken of as ancillary to a habeas corpus. Or it might happen that the Crown, in order to shew that there was a valid conviction behind the commitment which was attacked, would sue out a writ of certiorari and have the conviction brought up and the commitment amended or a good one made out. Here again the record was used in the habeas corpus proceedings to inform the Court and to enable it to make a proper disposition of the habeas corpus. It was not used for the purpose of bringing up the record in order to have it quashed. So also a writ of certiorari was sometimes used to bring up documents when a writ of error had been issued. It appears to have been called a certiorari ad informandam conscientiam curiae: *Wood v. Branford*, 7 Mod. 104; *Lawn v. Sawbridge*, 11 Mod. 143.

If a person was in prison a writ of habeas corpus to bring up the body was the proper remedy, not a writ of certiorari to have the conviction or order brought up to be quashed. In *King v. Bowen*, 5 T.R. 156, the defendant had been committed to prison for being the father of a bastard child. Instead of applying for a writ of habeas corpus a writ of certiorari was applied for. The order was confirmed on the merits, but Lord Kenyon, in the judgment said:—"But before I give any opinion on the subject, I desire it may be understood that it is done under a protest, that no certiorari ought to have been granted to remove the order of sessions neither because I think that the proper mode of obtaining relief in this case if the defendant were entitled to it is by habeas corpus on a return to which the cause of commitment would be specified, and upon these the Court would be enabled to form an opinion whether or not those causes were sufficient to justify his detention."

Grose, J., said:—"Now it has been mentioned, I am inclined to think the writ ought not to have issued."

Lord Kenyon desired that this might not in future be considered as a case in which the Court had on consideration granted a certiorari to remove such an order. See also *Queen v. Riall*, 11 Irish Com. Law 279.

In *Church on Habeas Corpus*, sec. 264, it is said: "But the object of a writ of certiorari in habeas corpus proceedings is merely to bring up the record of an inferior tribunal or the evidence which was taken before the examining magistrate in order that the Court may act advisedly."

In 1 Chitty's Criminal Law 127, it is said: "At the same time the magistrate, in obedience to a certiorari usually issued from the Crown office with the habeas corpus, returns the depositions upon which the commitment was founded in order that the Court may be furnished with the means of judging in what way they should dispose of the prisoner." And in *Hurd on Habeas Corpus*, p. 353, he interpolates: "Not for the purpose of being acted upon separately under the certiorari." Of course this must be so because depositions could not very well be quashed.

In *Regina v. Chaney*, 6 Dowl. Practice 289, there was a habeas corpus issued, but not a writ of certiorari.

Patteson, J., said: "Here the certiorari is taken away, and, therefore, it is not in the power of the defendant to bring before the Court the conviction itself, but it was in the power of the prosecutor so to do. It is true that on the part of the Crown it was offered in the course of the argument to produce the conviction, but I cannot look at it because it ought to be brought here regularly by writ. The certiorari is not taken away from the Crown, and, therefore, it might have been brought before me, and I might have looked at it."

In *Re Allison*, 10 Exch. 561, there was a writ of habeas corpus. Inasmuch as there was no power to issue a writ of certiorari out of the Court of Exchequer the Crown, to support the commitment, produced the conviction verified by affidavit. The defendant's counsel objected that it could not be read,

inasmuch as it had not been removed by certiorari. Parke, B., said: "Since there is no other mode of bringing the conviction before the Court, it is sufficient to produce it verified by affidavit."

In the case of *In re Boothroyd*, 15 L.J.M.C. 57, the judges doubted whether, when the statute took away the writ of certiorari, the validity of the conviction could be enquired into.

In *Ex parte Tinson*, 39 L.J.M.C. 129, in the Exchequer Court upon a hearing on habeas corpus, counsel contended that the conviction could be looked at. Kelly, C.B.: "The conviction is not before us. It should have been brought up by certiorari."

In *In re Thompson*, 30 L.J.M.C. 19, upon the argument of the rule nisi for habeas corpus the information was brought before the Court on affidavit. Objection was made that it should have been brought up on certiorari. It was apparently referred to notwithstanding the objection.

This kind of writ was obtained ex parte. If the statute 13 George II., ch. 18 (G.B.), as to notices to the justices did not apply to this kind of writ it must have been because the justices not being affected by a discharge of the prisoner were not entitled to notice, whereas in the case of a writ to remove a conviction to quash it they were interested.

While this kind of writ could be issued out of the King's Bench to the Court of Common Pleas (*Hewson v. Brown*, 2 Burroughes 1034), a writ could not be sent to that Court to review anything in it. It is decided that a certiorari to remove a conviction for having it quashed could not be issued to the central criminal Court or the assizes, because it was a superior Court: *Reg. v. Boaler*, 17 Cox Cr. Cases 569.

On the other hand, the writ of certiorari to bring up a cause to have it determined in the Court above, or more particularly to quash the proceeding for error, brought a cause into the Court, and in respect to that cause the Court above thereupon became possessed of jurisdiction. After it was removed and filed affidavits were entitled in the cause and in the Court above:

Frank v. Wicks, 9 Dowl. 489; *Queen v. Jones*, 8 Dowl. 80. Before that they were not sworn in the cause: *Ex parte Nohro*, 1 B. & C. 267. This principle is shewn too by the case of *The Queen v. Nevins* in the Supreme Court of Canada: Cassels Digest 421. In that case the conviction and papers in connection with a prosecution under the Canada Temperance Act were brought before the Court of King's Bench in Manitoba by a writ of certiorari. On the papers so brought before the Court a rule nisi to quash the conviction was on motion granted, and after argument made absolute. On appeal to the Supreme Court of Canada it was held that the appeal would not lie, the cause not having arisen in a "Superior Court of original jurisdiction." Then it is old law that the writ of certiorari from the time of its delivery supersedes the authority of the magistrate below. And that all proceedings there taken afterwards are erroneous: 2 Hawkins Pleas of the Crown, ch. 27, sec. 64; *Cross v. Smith*, 1 Salk. 148; Dickenson's Guide to the Sessions, 630. Again, it is said that after the affirmance of the conviction in the Court above, the process for the recovery of the penalty must issue out of that Court, for the record being there, the justices below have no further authority and cannot award any process upon it: *Rex v. Pullen*, 1 Salk. 369; *King v. Speed*, 1 Salk. 379.

In the last case on conviction affirmed and a lev. fac. awarded, the Court held "that this Court must award execution for the record here cannot be removed or sent back to the justices, and as the Court has power to affirm the conviction, the Court in necessary consequence has power to award execution."

Now, in this case I am of opinion that the ex parte order of Mr. Justice Townshend was no better than a writ of certiorari to bring up records for the information of the Court, for reasons to be presently given I think it is not even to be classed with that species of writ. I think it did not bring into this Court a cause or rather two causes—for there are papers in two—in respect to which this Court is possessed of juris-

diction. A cause must be properly instituted. There is generally a writ of some kind. Unless there is a statute enabling this Court by a direct motion to quash judicial proceedings like awards made out of Court under statutes, inquisitions, orders of municipal councils, assessments, by-laws and other matters there must be a writ of certiorari to remove them into the Court before it has that jurisdiction. The mere fact of any of them being on the files of the Court certified or verified for use as evidence by the same officer who would make the return to a writ of certiorari to bring them up does not constitute a cause in the Court in which affidavits or orders may be made or which may be tried de novo.

Take the case of appeals from the inferior tribunals both to the county court and to this Court, many judicial proceedings, particularly convictions, are put in evidence and are certified to the Court of Appeal by the authority who would make a return to a certiorari. I apprehend that this would not give the Court above jurisdiction to quash them when they reach the files.

The old learning about the necessity of making a submission or an award a rule of Court before the Court would have jurisdiction to quash the award or to enforce it, illustrates this view: Russell on Awards, 5th ed., 634. The kind of jurisdiction we are dealing with is possessed by this Court in the class of cases by reason of a writ of certiorari and a return thereto filed in the Court.

In the case of *Moffatt v. McRitchie*, 19 N.S.R. 228, instituted before justices for a debt the plaintiff had not on obtaining the summons deposited a sufficient amount under the statute to pay the defendant's travelling expenses. Upon the appeal to the county court the judge reserved a case for the Supreme Court. In the judgment of one of the judges of the Supreme Court it is said: "I am of opinion that the county court judge had no power to hear the application on the question raised by the affidavit of the deficiency in the amount paid in at the time of

the summons. It appears to me that did not properly come before him on the appeal. The remedy I think was by certiorari while the case was before the magistrate."

In *Sawyer v. Wood*, 18 Wend. 632, a writ of certiorari was returnable on the first day of October term, 1836. It was returned previously to the return day, and an inquest was taken above. A motion was made to set aside the inquest for irregularity on the ground that the writ could not be returned so as to possess the Court of the cause till the return day. The motion was granted. The statute which only authorized proceedings above upon the turn being made the judge said, meant *regularly* made; but he added this: "It is of the nature of process that it cannot be returned so as to take effect previous to the return day. In this respect the statute has made no alteration."

This order greatly differs from a writ of certiorari. It is good possibly to bring up the papers for evidence, but regarding it as something in lieu of a certiorari, to bring up a cause for the purpose of quashing the conviction, it is uncertain. It does not describe or identify any cause before the justice. It has in fact brought up the papers in two distinct causes, and such a requirement, if written out in the mandate, would render a writ liable to attack for being multifarious. Apparently the magistrate followed a blank form of return endorsed upon it which specified the papers required. Otherwise he could not have discovered what was wanted. It was a question of law whether the papers in the cause for the "second" offence "related" to the imprisonment for the third offence. The relation was somewhat remote. A magistrate never could have been attacked for disobedience of a certiorari containing such a mandate. Have we the two convictions in two causes before the magistrate and "all things touching the same as fully and perfectly as they have been made by him?" A writ of certiorari is drastic. Read this order and the return, and there is no identification of the matters before us with the matters before the magistrate: *Regina v. Plint*, 2 Ld. Raymond 820. Who from the face of the order is the other party? Who is the defendant's solicitor?

A writ of certiorari would have the name of the solicitor issuing the writ. Then it is the original writ which should be served upon the magistrate to be returned by him and read in the Court above. He is required in a certiorari to send back "this our writ." Here the return is made to a certified copy of Mr. Justice Townshend's order. Then there are formal words in a writ of certiorari giving notice that the Court will exercise jurisdiction over that cause when brought up. They are "that we may cause further to be done thereon what of right and according to the law we shall see fit to be done."

Now the magistrate and the prosecutor were in this position when the order came to the stipendiary, and it would be an embarrassing one if they could have anticipated these motions. If they moved to quash or supersede a certiorari upon any such grounds as I have indicated, the answer could have been effectually made that this order was to bring up evidence, it was not intended to bring up a conviction to quash it. And some of these grounds which would be open to them in the case of a writ of certiorari, at least before the return was made and filed, would not be open to them afterwards: *Reg. v. Turk*, 10 Q.B. 539.

Then take the return to the order. Does the statute contemplate a return or give the efficacy to a return that it does to a return to a writ of certiorari?

It is accidental that in this case the order went to a judicial person. It might be directed to a sheriff, a clerk of the municipality, or any one who had any such documents in his possession. The order contemplated is more like a subpoena than a certiorari. It is not at all clear that such papers are sent to any tribunal other than the judge hearing the application. As part from the question of the title of the order made by Mr. Justice Townshend and the return, it is not, I think, regular in this application to read a return made in another matter.

Then the question arises whether a defendant is entitled to disregard the five provisions which I have enumerated in respect

to the writ of certiorari and the application to the Court above, and to obtain the same benefit from an ex parte order. There are no restrictions in regard to obtaining it. Why should the magistrate be deprived of the privilege of being heard through this indirect act of obtaining papers from him for one purpose and using them for another? He has an interest in not having the convictions quashed (*Haylock v. Sparke*, 1 Ell. & Bl. 477), and of being heard as to the imposition of terms that no action shall be brought if they are quashed: Cr. Code, sec. 891. There is no statute or rule which provides for serving him with any process, or notice to attend this application, or which entitles him to be heard. The granting of a writ of certiorari to bring up a conviction to have it quashed is in the discretion of the Court. But neither the prosecutor nor the magistrate were heard. They were entitled to security for costs. They were entitled to argue that the writ had been taken away. The order was granted upon the application of the defendant. The convictions were not brought up at the instance of the prosecutor or the magistrate, for then the defendant might plausibly, at least, claim the right to turn the tables on the prosecutor. Probably it may be that when a defendant was released on habeas corpus that was sufficient for his purpose, but I have found no English case in which the Court in addition to releasing the prisoner quashed the conviction or order brought up by the ancillary writ of certiorari.

The case of *Reg. v. Whelan*, 45 U.C.Q.B. 396, was the case relied upon by the defendant's counsel. I think it is distinguishable in any event. The writ of certiorari was granted under a statute at the same time as the habeas corpus. It was a writ of certiorari good in form for either purpose, for the information of the Court or for quashing a conviction, and this fact was mentioned in the judgment. It was explained in the next case in the same volume of reports as being a writ of certiorari issued at the instance of the judge, and therefore was not a case in which security should be required as usual. It

was not obtained as this order was, by the defendant who would thus get rid of the provisions necessary to be taken in order to obtain a writ of certiorari. In the earlier case of *Regina v. Levecque*, 30 U.C.Q.B. 517, a majority of the Court thought that a conviction brought up in the same way should not be quashed, and the learned judge who delivered the judgment in the later case distinguished it from the earlier one by saying that in that case the defendant was deprived of the writ of certiorari by the statute, and therefore could not have the conviction quashed in another way.

If that was a good ground it leaves this case to be governed by *Reg. v. Levecque*, 30 U.C.Q.B. 517, because here, as in that case, the defendant was deprived of the writ of certiorari by the statute. The language of the earlier case relied upon to support the later one was as follows: "We might still be obliged to consider the conviction as upon a certiorari issued at the common law if we found the conviction in this Court, however, brought here so long as it was regularly here": *The Queen v. Hillier*, 17 Q.B. 229; *The Queen v. Hyde*, 16 Jurist 337. It is necessary to look at these two English cases to see what support they give to the defendant's contention. There may be other cases which were not referred to which support the Ontario judgment. None were cited to us. The first one is *Queen v. Hillier*. By a statute 12 & 13 Vict. ch. 45, sec. 18 (Imp.), an order of sessions might be moved into the Court of Queen's Bench for the purpose of enforcing it. "And thereupon such order shall be of the same force and effect and may be enforced in the same manner as a rule made by the said Court of Queen's Bench." No certiorari was required. The prosecutor had the order removed under the statute for the purpose of enforcing it, and a fi. fa. was issued. Then the defendant moved to set aside the order, the execution and subsequent proceedings. During the argument Coleridge, J., said: "The fi. fa. and all proceedings thereon should be set aside and the £24 17s. 6d., and the costs levied on, refunded."

And Patteson, J., in giving judgment said: "If the order is brought up and the application made the adverse party may object to the order itself (but not to go further back), though there could have been no certiorari;" and the form of judgment was—"Rule absolute to set aside the fi. fa. and all proceedings on the order of sessions, no further proceedings taken to enforce the same, defendant undertaking to bring no action if the money paid under the fi. fa. and the £10 be refunded within a fortnight."

Now, the Court, in that case, while it set aside its own proceedings taken upon the order of the sessions, did not quash that order. It would not go further back than its own proceedings.

In *Reg. v. Hyde*, 16 Jurist 337, there was an appeal to the sessions against a conviction, and an order was made confirming the conviction. Notwithstanding the statute took away the writ of certiorari, the defendant obtained a writ to remove the conviction and order into the King's Bench. Of course, the writ would even in that case be properly granted if there was a defect of jurisdiction, and that is commonly a debatable point. That application for the writ is reported in a previous volume of the Jurist, namely, as *In re Hyde*, 15 Jurist 803. Then the defendant, as appears in the report in 7 Ellis & Blackburn 860, note, obtained a rule calling on the prosecutor to shew cause why the conviction and order of sessions confirming it "which had been brought up by certiorari" should not be severally quashed. I say all this because, from something reported to have been said by Mr. Hawkins, the counsel for defendant, in citing *The Queen v. Hillier* (supra) in the Jurist, but not in 7 Ellis & Bl. 861, it was supposed by a reporter that the order of sessions had been brought up by the prosecutor under the statute to enforce it as in the case of *Reg. v. Hillier*, supra. It appears, however, to have been brought up by certiorari, and at the instance of the defendant. There may have been the other application, too, but this is improbable. Mr. Hawkins

argued, according to 7 Ellis & Bl. 861: "The objections can be properly entertained on the present rule because the conviction is before the Court upon the writ of certiorari" (here, according to the Jurist, he cited *Reg. v. Hüller*). "If that writ issued improvidently there should have been a motion to quash it. The conviction is bad on the face of it, etc."

Lord Campbell, C.J.: "I am very doubtful whether this Court has jurisdiction to entertain the objections, the writ of certiorari being taken away. I am strongly inclined to think that the writ issued improvidently, and if it did, I doubt whether the fact of its having issued can authorize us to entertain the objections."

And each of the judges, according to the report of the Jurist, expressed the same doubts, because it was not clear that there was an excess of jurisdiction, but did not decide the matter, because they dismissed the rule nisi to quash the conviction on the ground that it was sufficient in any event.

I think these two cases only shew this. In *Reg. v. Hüller*, supra, although the order of sessions under the statute had become a rule of the King's Bench, the Court declined to quash it although it was bad, but only quashed the subsequent proceedings to enforce it which that Court had created. And in *Rex v. Hyde*, supra, the Court did not quash the conviction, and expressed doubts whether they could in any event quash it, because it was brought up by a writ of certiorari which they thought might be held to have issued improvidently.

An Irish case where there was a certiorari to remove the cause is in point. In *Rex v. Hennesey*, 2 Hudson & Brooke 373, there was an appeal to the quarter sessions from a conviction by justices imposing a penalty for the malicious burning of land, and on the appeal the conviction was reversed with costs. There was a certiorari taken to the sessions for a removal of the proceedings into the King's Bench in Ireland, and that Court was moved to quash the order of the Court of quarter sessions, principally on two grounds, (1) That there was no appeal to the sessions; (2) That the recognizance on the appeal was bad.

The counsel, in shewing cause against the motion to quash, sought to turn the attack, and contended "that the conviction was bad, and that it was open to the Court if they saw it was erroneous to quash it and not to allow execution to issue upon it; (that) the case came before the Court upon a rule that the 'return be filed and set down for argument,' the whole record was before the Court, and it was no matter by whom it was brought there: any motion upon it was merely *ore tenus*, and it was as open to one side to move to have the conviction quashed as to the other to have the order of reversal quashed: and they were not to be put to move for a *certiorari* to remove from the clerk of the peace what was already here. But the Court considered that if the defendant's object was to have the conviction quashed he was bound to proceed for that purpose in the usual course, and could not now turn round on the return to a *certiorari* which had been obtained only for the purpose of removing the order for reversal. If it were sought to remove the conviction the Court might on certain grounds, as of delay in not applying, etc., exercise their discretion to refuse the writ." There were several cases. In the cases in which the security on the appeal was defective the orders of session were quashed; in the cases in which it was good they were affirmed.

It is not necessary in the view I hold to decide whether or not the stipendiary magistrate had jurisdiction to make the "second" conviction, or whether the refusal to grant a writ of *certiorari* prevents the defendant from moving again in this proceeding, or whether the validity of the "second conviction" can be inquired into collaterally upon a motion to quash to "third" conviction. The preliminary objection must prevail.

In my opinion each application to quash should be dismissed, and with costs. As to costs: in *Pringle v. Secy. of State for India*, 40 C.D. 288, Cotton, L.J., said: "But as the plaintiff wrongly applied to the Court for its interference, I think that we have jurisdiction independently of any statutory enactment to make him pay the costs occasioned by the wrongful application."

And Bowen, L.J.,: "I have always understood it to be a broad principle that a Court, which is put in motion wrongly, has inherent jurisdiction to compel the person who puts it in motion wrongly, and who brings an innocent party to answer an unfounded claim or an unjustifiable proceeding, to pay costs." See also *The Queen v. Justices of Tipperary*, L.R. Ireland 1897, 2 Q.B. 515.

MACDONALD, C.J., and TOWNSHEND, J., concurred.

MEAGHER, J.:—I cannot find anything in any of the reports of *The Queen v. Hurlburt* [26 N.S.R. 123; 2 Can. Cr. Cas. 331; 27 N.S.R. 62] to justify the contention made by the defendant. If there is, the answer I make is that the point now urged on behalf of the Crown was overlooked.

Until the conviction is brought into this Court by a return to a writ of certiorari under the hand and seal of the judicial officer to whom it is directed requiring it to be so certified, the Court has no power to quash it. It is the return in due form which gives the necessary jurisdiction to revise the conviction. See *Mosher v. Doran* (1878), 3 R. & C. 184. In *Palmer v. Forsythe* (1825), 4 B. & C. 401, the Court quashed the certiorari because a copy of the record and not the record itself was returned. The record before the Court was in that case no doubt correct in point of fact, but the Court would not entertain the motion until the conviction came before it certified and authenticated by a due return as the original.

There is no difference between the practice upon the point raised here and that prevailing in Courts where the writ of error exists. I am quite sure no case can be found where a Court of error undertook to review or examine a record which appeared upon its files but which was not brought into it by a return in due form and course to a writ of error. It is the return which gives the Court of error jurisdiction. So strictly has this view been held that the Courts have refused to entertain a motion to quash a writ or amend it until the transcript was

returned and filed. See Tidd's Practice, 9th ed., 1161, and *A'court v. Swift*, 1 Lord Raymond 329. The motion should be refused with costs.

WEATHERBE, J., dissented.

Motion refused with costs.

Note: *Convictions filed in superior court without certiorari.*

In the North-West Territories the Supreme Court of the Territories discharges the functions of a Court of General Sessions of the Peace, and the return of summary convictions, depositions, etc., is made to the office of the Supreme Court under sec. 801 of the Code. On the question arising as to the right to entertain a motion to quash a conviction so on file, the full court was equally divided. *R. v. Monaghan* (1897), 2 Can. Cr. Cas. 488. It was considered by Scott and Rouleau, JJ., that a conviction returned by justices in compliance with a statutory requirement that it may be kept among the records of the superior court, is regularly before the Court and cannot be dealt with on a motion to quash the conviction, without any writ of certiorari. This view was again enunciated by Rouleau, J., in *R. v. Ashcroft* (1899), 2 Can. Cr. Cas. 385.

The opinion of Richardson and Wetmore, JJ., in *Monaghan's case* was that the conviction was not regularly before the Court, and that a writ of certiorari was necessary before a motion to quash the conviction could be properly made. 2 Can. Cr. Cas. 488, 493.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE SIR WILLIAM RALPH MEREDITH, C.J.C.P., AND MACMAHON
AND LOUNT, JJ., SITTING AS A DIVISIONAL COURT.

THE KING v. MCKINNON.

Summary convictions—Prosecution under provincial statute—Ontario Summary Convictions Act—Time for commencing prosecution—Limitation—Incorporation of procedure under Criminal Code—The “like proceedings,” meaning of—R.S.O. 1897, ch. 90, sec. 2—Crim. Code sec. 841.

1. The effect of sec. 2 of the Ontario Summary Convictions Act (R.S.O. 1897. c. 90) is to incorporate sec. 841 of the Criminal Code which limits the time within which summary proceedings shall be commenced to six months after the offence was committed, unless otherwise specially provided.
2. A summary prosecution in Ontario for erecting, putting up and placing within the fire limits of a town a wooden building contrary to a municipal by-law is barred if a complaint is not laid until after the expiration of six months following the date of the offence.

ARGUED: March 13, 1902.

DECIDED: March 13, 1902.

THIS was a motion to make absolute an order *nisi* to quash a conviction of the defendant, dated November 2nd, 1901, for that in the month of April, 1900, at the town of Durham, he did erect, put up and place on lot 11 on the west side of Garafraxa street, within the area of fire limits established by by-law 336 of the town of Durham, a frame or wooden building.

One of the grounds upon which the motion to quash the conviction was based was that the information was not laid within six months after the offence complained of, if any, was committed, as required by the statute on that behalf, and that the proceedings were, therefore, irregular and void.

TORONTO, March 13th, 1902.

N. W. Rowell, for the defendant, raised the above objection, and referred to sec. 841 of the Criminal Code, 55-56 Vict. ch.

29 (D.), and to R.S.O. 1897, ch. 90, sec. 2, as incorporating that provision.

W. R. Riddell, K.C., for the prosecutor, contended that there was no limitation of time in laying an information unless such was laid down in the by-law authorizing it, or in some statute under which such by-law was passed: that R.S.O. 1897, ch. 90, sec. 2, only dealt with the kind of proceedings to be taken, and not with the time within which they were to be taken; that it only covered the procedure and not the limitation of time. [MEREDITH, C.J.: The limitation of time is part of the procedure.]

Per Curiam: We think the objection as to the time of laying the information is fatal to the conviction. It is quite true that R.S.O. 1897, ch. 90, sec. 2, which we think incorporates sec. 841 of the Criminal Code, might have been better phrased, but looking at the state of the law at the time of the passing of the original of R.S.O. 1897, ch. 90, sec. 2, namely, 38 Vict. ch. 4, sec. 3, and the provisions of the laws then existing, we get some light on the matter. C.S.C. ch. 103, which by sec. 26 provided that informations should be laid within three months, was repealed, and in order to prevent anomalies from a different law applying to summary proceedings under Ontario Acts, from that which applied to proceedings under Dominion Acts, the Ontario Legislature adopted Dominion legislation. If Mr. Riddell is right there would be now no limitation at all. We can hardly think the Legislature intended this, when its policy throughout has been to prescribe a short limitation of time within which the information may be laid. The language used may be so read as to carry out what seems to have been the intention of the Legislature. It may be read to cover the time within which the information is to be laid; we may say this comes within "like proceedings." Then there are also the other words, "otherwise in respect thereof."

Conviction quashed without costs. Usual protection of the magistrate.

Conviction quashed.

Note : *Procedure under Ontario Summary Convictions Act.*

90, the Section 2 of the Ontario Summary Convictions Act, R.S.O. 1897, ch. which is referred to in the above case reads as follows as amended by Ontario Statutes of 1901, 1 Edw. VII., ch. 13, sec. 1:—

2.—(1) Where a penalty or punishment is imposed under the authority of any statute of the Province of Ontario, or of any other statute or law in force in Ontario, and relating to matters within the legislative authority of the Legislature of the Province, and is recoverable before, or may be inflicted by, a Justice of the Peace, or a Police or Stipendiary Magistrate, the like proceedings, and no other, shall and may be had for recovering the penalty, compelling the attendance of the parties or witnesses, hearing the complaint, and for the conduct of the Court, the taking and estreating of recognizances, and the infliction of the punishment, and otherwise in respect thereof, and the convicting Justice, or Police or Stipendiary Magistrate, shall perform the like duties in respect thereto, and in respect of any conviction or order made by him or them by virtue of such statute, as, under the statutes of the Dominion of Canada then in force, might be had and should be performed, if the penalty or punishment had been imposed by a statute of Canada unless in any Act hereafter passed imposing the penalty or punishment, it is otherwise declared; and for greater certainty it is hereby declared that this sub-section is intended to include and to make applicable to any such conviction or order and to any warrant for enforcing the same the provisions of the said statutes of Canada relating to the matters and things which are dealt with or included in secs. 889 to 896, both inclusive, of The Criminal Code, 1892.

“Nothing herein contained shall be deemed to imply that the said provisions are not now included in the said sub-sec. of sec. 2 and sec. 8, respectively, or to limit the application of the said sub-section and section.”

(2) Nothing in this section contained shall confer upon any person who considers himself aggrieved by a conviction or order made by any Justice, or Police or Stipendiary Magistrate, the right of appealing to the General Sessions of the Peace, or shall affect procedure on appeals. R.S.O. 1887, ch. 74, sec. 1.

(3) Subject to any statute of the Province in this behalf, the procedure for enforcing punishment by fine, penalty or imprisonment for contravention of any statute of the Province, shall conform as nearly as may be to the procedure which might at the time be had under any statute of the Dominion of Canada enforcing the like punishment under such statute. 52 Vict., ch. 10, sec. 9.

Section 7 of the same Act provides for an appeal against a summary conviction to the Court of General Sessions of the Peace, and by an amendment made in 1902 (2 Edw. VII. (Ont.), ch. 12, s. 14,) the following sub-section was added:—“(2) No such conviction or order as aforesaid shall be removed into the High Court of Justice by writ of certiorari except upon the ground that an appeal to the Court of General Sessions of the Peace as herein provided would not afford an adequate remedy.”

By the statute 2 Edw. VII. (Ont.), ch. 12, sec. 15, the provisions of the Criminal Code as to amendment of convictions or orders either on appeal or when removed by certiorari will hereafter apply to convictions or orders made under the authority of any statute of Ontario or under any by-law passed by virtue of such authority.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE WALKEM, J.

THE KING v. JACK (No. 2.)

Obstructing a peace officer in execution of his duty—Jurisdiction of two justices to try—Obstruction without charge of assault—Code sec. 144 not limited by secs. 783 and 788—Consent of accused not required under sec. 144—Code secs. 144, 783, 784, 788.

1. The offence of obstructing a peace officer in the performance of his duty, where an assault upon the officer is not also charged, may be summarily tried by two justices of the peace or a police magistrate (sec. 541) under the Summary Convictions Part of the Code (LVIII.) by virtue of sec. 144; and the latter section is not controlled by the provisions of secs. 783 and 788 as to the summary trial of the like offence before a magistrate with the consent of the accused.
2. In such case the punishment is limited to that specified in sec. 144 and sec. 788 providing a different punishment on a trial before a magistrate with the consent of the accused does not apply.
3. The consent of the accused is not necessary to the jurisdiction of two justices to try the offence under section 144.
4. *Semble*, if the charge were for an *assault* of the officer in the performance of his duty, sections 783 and 788 would then apply and not section 144.
5. In the Province of British Columbia the magistrate has absolute jurisdiction to proceed under the Summary trials Part (LV.) by sec. 784 (3) without the consent of the accused, and to award both fine and imprisonment under section 788.

ARGUED: February 10, 1902.

DECIDED: February 13, 1902.

Motion for certiorari argued before WALKEM, J., on 10th February, 1902.

Helmcken, K.C., for the motion.

Macleay, D.A.-G., contra.

VICTORIA, B.C., February 13, 1902.

WALKEM, J.: Three Indians, named Jack, Dick and Markwa, living in the vicinity of Kingcome Inlet in the County of Vancouver were charged in November, 1901, with having "unlawfully and wilfully obstructed two peace officers, named Wollacott

and Huson, in the execution of their duty, contrary to the provisions of section 144 of the Criminal Code, and were subsequently summarily tried and convicted, and sentenced to six months' imprisonment under that section, by Captain Walbran, a Stipendiary Magistrate for the county.

A motion is now made, on their behalf, by way of certiorari to quash the conviction on the alleged grounds that the accused were neither formally charged nor allowed to defend themselves at the trial, and on the further ground that their conviction was illegal, as section 144 is, so it is said, controlled by sections 783 and 784—and hence, as to punishment, as I assume, by section 788.

After examining all the proceedings, and reading the affidavits, respectively, filed in support of, and against the motion, I have no hesitation in saying that the proceedings were regular, and the trial conducted with fairness, and with a manifest consideration for the interests of the prisoners.

With respect to the contention that section 144 is controlled by sections 783 and 784, there is no ground for upholding it. The language of section 144, which is relied on by the prosecution is—"Every one is guilty of an offence and liable on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to six months' imprisonment with hard labor, or to a fine of one hundred dollars, who resists or wilfully obstructs any peace officer in the execution of his duty, or any person acting in aid of such officer;" whereas the language of section 783 is as follows:—"Whenever any person is charged before a Magistrate

"(e) with having *assaulted*, obstructed, molested or hindered any peace officer, or any officer in the lawful performance of his duty, or with intent to prevent the performance thereof—

"The Magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way;" and (see section 788) if the charge be proved, sentence the offender to a term of imprisonment not exceeding six months, with or without hard labor, or to pay a fine not exceeding one hundred

dollars, or to suffer both fine and imprisonment. It will thus be apparent that the punishment mentioned in section 788 differs materially from that mentioned in section 144, although the offence is the same. Section 783 also contains the word "assaulted," which is absent in section 144. It must be admitted that that word is a very important one; for instance, the mere hindering of a peace officer in the discharge of his duty is a far less serious offence than assaulting him under the same circumstances. An offence can not be charged under one enactment, complete in itself, and a different punishment inflicted by virtue of another and somewhat different enactment.

The next objection is that the consent of the prisoners to a summary trial was not given; but sub-section 3 of section 784 dispenses with consent and makes the magistrate's jurisdiction absolute. The summary conviction referred to in section 144 means a summary conviction under Part LVIII. of the Code, and such the present conviction is. The motion must be refused with costs.

Certiorari refused.

[HIGH COURT OF JUSTICE, ONTARIO].

BEFORE STREET AND BRITTON, JJ., SITTING AS A DIVISIONAL COURT.

THE KING V. MEEHAN (No. 1).

Mandamus to justices to take information—Civil procedure—Application of provincial Judicature Act—Jurisdiction of single judge in court—R.S.O. 1897, ch. 88, sec. 6.

1. An application for a mandamus against a magistrate is a civil and not a criminal proceeding, although the act which it proposed the justice shall be ordered to do is the taking of an information for an offence against the criminal law.
2. The procedure upon such applications in Ontario is governed by the Ontario Judicature Act, and the application for an order absolute must be made to a single Judge in Court and not to a Divisional Court.

ARGUED: February 14, 1902.

DECIDED: February 27, 1902.

Motion to make absolute an order *nisi* granted on February 7th, 1902, by a Divisional Court composed of Ferguson and Meredith, JJ., under sec. 6 of ch. 88 R.S.O. 1897, requiring the defendant Patrick Meehan and the police magistrate of the city of St. Thomas to shew cause why a writ or order of mandamus should not be issued commanding the said police magistrate to receive and take the oath of one Alexander D. Turner to a certain information preferred by him against the said Meehan, and proceed thereon according to law.

TORONTO, February 14, 1902.

I. F. Hellmuth, moved to make the order absolute.

E. E. A. DuVernet, raised the preliminary objection that the proper proceeding was by a motion before a Judge in Court under sec. 6, ch. 88 R.S.O. 1897, and not before a Divisional Court. The application may be made to the High Court or a Judge of the county court. The Divisional Court is invested with certain functions under secs. 66 and 67 of the Act, and if the application was first made to a single Judge, and an appeal

taken from him, it would be to the Divisional Court: *Regina v. Beemer* (1888), 15 O.R. at p. 272; *Regina v. Wasson* (1890), 17 A.R. at p. 245, *per Osler, J.A.*; *Re Potter and Central Counties R. W. Co.* (1894), 16 P.R. 16, followed in *Re Montreal and Ottawa R. W. Co. and Ogilvie* (1898), 18 P.R. 120; *Re E. J. Parke* (1899), 30 O.R. 498; *Holmsted & Langton*, 2nd ed., 117, 239.

I. F. Hellmuth: A Divisional Court may hear this motion in the first instance. A disobedience of a statute is an indictable offence at common law. The magistrate should have dealt with it: sec. 554 of the Code. This proceeding should be as for a criminal offence: R.S.O. 1897, ch. 90, sec. 2, sub-sec. 3. The Divisional Courts have been constituted criminal courts, and criminal matters and matters of contempt should come before them: Code sec. 3, sub-sec. (y); *Queen v. Birchall* (1890), 19 O.R. 697. Even if a motion might be made under R.S.O. 1897, ch. 88, before a Judge in Weekly Court, that would not oust the jurisdiction of Divisional Court to entertain the same if the Court saw fit; for a Divisional Court is the High Court as much as a Judge sitting in Weekly Court.

John R. Cartwright, K.C., Deputy Attorney-General, for the Crown, also supported the motion.

TORONTO, February 27, 1902.

The judgment of the Court was delivered by

STREET, J.:—It is provided by sec. 6 of ch. 88 R.S.O. 1897, that "In all cases where a justice of the peace refuses to do any act relating to the duties of his office as such justice, the party requiring the act to be done may, upon an affidavit of the facts, apply to the High Court or to the Judge of the county court of the county or united counties in which the justice resides, for an order *nisi* calling upon the justice, and also the party affected by the act, to shew cause why the act should not be done; and if, after due service of the order, good cause is not shewn against it, the Court or Judge may

make the same absolute, with or without or upon payment of costs, as may seem meet, and the justice, upon being served with the order absolute, shall obey the same, and shall do the act required; and no action or proceeding shall be commenced or prosecuted against the justice for having obeyed the order and done the act required as aforesaid."

The order *nisi* and the order absolute provided for by this section are civil and not criminal proceedings, although the act which the justice is ordered to do may be, as here, the taking of an information for a criminal offence, and although the proceedings are taken in the name of the King.

It is, therefore, to the Judicature Act and the Rules of Court, taken along with the section above quoted, that we must look in order to ascertain the tribunal in which the proceedings are to be taken—that is to say, in order to ascertain what is meant by "the High Court" in the section. Does it mean the Divisional Court, or does it mean a single Judge of the High Court sitting in Court?

By the 65th section of the Judicature Act, it is provided that "(1) Every action and proceeding in the High Court, and all business arising out of the same, except as hereinafter provided, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single Judge.

(2) A Judge sitting elsewhere than in a Divisional Court, is to decide all questions coming properly before him, and is not to reserve any case, or any point in a case, for the consideration of a Divisional Court.

(3) In all such cases any Judge sitting in Court shall be deemed to constitute a Court."

If this application is one of the matters assigned by the Judicature Act, sec. 67, or by any Rule of Court to be heard by a Divisional Court, it is properly before us; otherwise it should be heard by a single Judge in Court under sec. 65 of the Judicature Act.

The only head of Divisional Court work under which it could come is sub-sec. (a) of sec. 67, which assigns to the

Divisional Courts "Proceedings directed by any statute to be taken before the Court, *in which the decision of the Court is final.*"

The word "final" is here used in the sense of "not appealable;" and, therefore, if it is to be gathered from sec. 6 of ch. 88 R.S.O., that there is to be no appeal from the order absolute to be made under it, then the present matter is properly before us, otherwise it must be brought before a single Judge sitting in Court.

No appeal is expressly given by the section itself, but the order is in fact in the nature of the former writ of prerogative mandamus, and of the present order of mandamus, granted upon motion under the Judicature Act and Rules of Court, which is clearly a matter in which an appeal lies. There is, therefore, no apparent reason why such an order, when made under the section in question, should not take its place alongside orders of a similar character, and fall under sub-sec. (1) of sec. 75 of the Judicature Act, which gives an appeal to the Divisional Court "from any judgment or order of a Judge of the High Court in Court, whether at the trial or otherwise."

The fact that the order may be made under sec. 6 of ch. 88 R.S.O., by a Judge of the county court seems to present no argument against this conclusion, because an appeal against his decision appears to be given by sec. 52 of ch. 55, the County Courts Act.

I conclude, therefore, that orders absolute made under sec. 6 of ch. 88 R.S.O., are not final, but are appealable; that, as a result they are to be heard before a single Judge, sitting as the High Court, and not before a Divisional Court, and therefore that the present motion cannot be entertained by us.

The application for the order *nisi* was made *ex parte* to the Divisional Court which made it, and their attention was not directed to the question of jurisdiction.

The matter has, however, been fully argued before us at great length, and by consent of the parties a further argument may be rendered unnecessary. If such a consent is forthcoming

within one week, judgment upon the merits will be delivered by a single member of the Court, otherwise the rule *nisi* will be discharged without costs, and without prejudice to a further application to a single Judge in Court.

Notes:

The respondent declined to accept the suggestion of the court and the rule nisi was dismissed without costs and without prejudice to another application being made in single court. A rule nisi was afterwards granted in single court and made absolute by Robertson, J. The report of the second application appears as the next case in this volume, *sub. nom. R. v. Meehan* (No. 2).

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ROBERTSON, J.

THE KING v. MEEHAN (No. 2).

Statutory prohibition of certain acts—Public policy—Remedy by indictment—Wilfully and corruptly voting without legal right—Private prosecutor's application to magistrate for process—No fees to magistrate if offence cannot be adjudicated upon by him—Jurisdiction of magistrate—Mandamus to compel a "preliminary enquiry"—Ontario Municipal Act, R.S.O. 1897, c. 223, s. 158 (a)—1 Edw. VII. (Ont.) c. 26, s. 9—Criminal Code secs. 138, 554, 558.

1. Where the doing of a particular act is prohibited by statute on public grounds, and the statute does not declare a mode of enforcing the prohibition, the offence is indictable.
2. A person who without lawful excuse wilfully and corruptly votes more than once at a municipal election for city aldermen by general vote under sec. 158 (a) of the Ontario Municipal Act is guilty of an indictable offence by virtue of sec. 138 of the Criminal Code (disobedience of statutes).
3. Wrongfully voting twice at an election would not be indictable at common law unless prohibited by statute, and, *semble*, every contempt of a statute is indictable at common law where no other mode of punishment is provided.
4. Where a magistrate is applied to for process in respect of an indictable offence which cannot be dealt with summarily, no fees can be demanded by him therefor.
5. The court will not grant to the prosecutor a mandamus to compel a rehearing by the magistrate of an application for process in respect of an indictable offence, if the magistrate has exercised his discretion (although erroneously) in refusing the process after being put in possession of the facts on which he can exercise discretion.
6. If the magistrate on an application for process erroneously holds that the offence is not indictable and that he therefore has no jurisdiction to hold a preliminary enquiry in respect thereof, a mandamus will lie to compel him to do so.

ARGUED: March 13, 1902.

DECIDED: April 10, 1902.

MOTION on behalf of the private prosecutor for a mandamus to the magistrate to receive his information on a charge of illegal voting upon a municipal election.

The following statement of the facts is taken from the judgment:—

This was a motion to make absolute a rule *nisi* issued on the 27th of February, 1902, calling upon James Morrison Glenn, police magistrate in and for the city of St. Thomas, and Patrick Meehan, to appear and shew cause why an order should not be issued and granted directing and commanding the said magistrate to receive and take the oath of one Alexander D. Turner to a certain complaint or information in writing, preferred by the said Turner against the said Patrick Meehan, and to proceed thereon according to law. The rule was issued under R.S.O. 1897, ch. 88, sec. 6. The affidavits and papers filed on the motion shew that the complainant, Turner, did attend at the police court in the city of St. Thomas on the 3rd of February last before the said police magistrate, and requested and demanded that he the said police magistrate should receive an information under oath from him, the said Turner, declaring that he was informed and believed that the said Patrick Meehan, on the 6th day of January, A.D. 1902, at the said city of St. Thomas, after having voted once and not being entitled to vote again at the election for aldermen to serve for the municipal corporation of the said city of St. Thomas for the year 1902, being then and there held, did wilfully and corruptly apply at the said election for a ballot paper in his own name; and did at the said election of aldermen being then and there held, wilfully and corruptly vote three times for aldermen, contrary to the statutes in such case made and provided; and did thereby commit an interference with an election; that the said police magistrate did then and there, to wit, at the police court in the said city of St. Thomas, refuse to receive the said information and to swear the said Alexander D. Turner, and to proceed thereon: alleging, as a reason, that he the said police magistrate had no jurisdiction, either to hear the case and to dispose of it summarily; or to hold a preliminary investigation and determine whether the accused should be committed for trial if the evidence warranted him in so doing.

The election in question was by general vote, and took

place on the 6th of January, 1902. By 1 Edw. VII. ch. 26, sec. 9 (O.), the Municipal Act, R.S.O. 1897, ch. 223, is amended by inserting the following section:—"158a. In towns and cities where the councillors or aldermen are elected by general vote every elector shall be limited to one vote for the mayor and one vote for each councillor or alderman to be elected for the town or city, and shall vote at the polling place of the polling sub-division in which he is a resident, if qualified to vote therein; or when he is a non-resident, or is not entitled to vote in the polling sub-division where he resides, then where he first votes and there only." The charge is that Meehan voted for aldermen more than once, contrary to this provision.

In regard to offences and penalties, sec. 193 (*f*) declares that "No person shall, having voted once, and not being entitled to vote again at an election, apply at the same election for a ballot paper in his own name, or advise, or abet, counsel or procure any other person so to do." By sub-sec. 3 of this section, "A person guilty of any violation of this section shall be liable, if he is the clerk of the municipality, to imprisonment for any term not exceeding two years, with or without hard labour; and, if he is any other person, to imprisonment for a term not exceeding six months, with or without hard labour."

By the Criminal Code, sec. 138, it is declared that "Every one is guilty of an indictable offence, and liable to one year's imprisonment who, without lawful excuse, disobeys any Act of the Parliament of Canada, or of any legislature in Canada, by wilfully doing any act which it forbids, or omitting to do any act which it requires to be done, unless some penalty is imposed or other mode of punishment is expressly provided by law."

The offence sought to be charged against Meehan is that he did wilfully and corruptly apply at the said election for a ballot paper in his own name; and did at the said election wilfully and corruptly vote three times, contrary to sec. 158a of the Municipal Act; whereby and by reason thereof he the said Meehan did, without lawful excuse, violate the said sec. 158a of the Municipal Act, contrary to sec. 138 of the Criminal Code, 1892.

TORONTO, March 13, 1902.

J. R. Cartwright, K.C., asked leave to appear for the Attorney-General of Ontario, but on objection being taken by the respondents' counsel he did not press the application, and retired from the case, referring first as *amicus curiæ* to 5 Burn's Justice, p. 730; 2 Hawk. P.C., ch. 25, sec. 4; 1 Bishop on Criminal Law, 7th ed., sec. 237; Bacon's Abr., Tit. "Statute"—K; 1 Russell on Crimes, 6th ed., p. 199 *et seq.*; *Rex v. Harris* (1791), 4 T.R. 202; *Rex v. Sainsbury* (1791), 4 T.R. at p. 457.

J. M. McEvoy, for the applicant: In order to succeed in this application it is necessary to make out that the offence charged is an indictable one. The information charges that the offence is one both against the common law and against the statute law, but in view of the decision in *Regina v. Hogg* (1865), 25 U.C.R. 66, it probably cannot be successfully contended here that the act complained of would be an indictable offence as at common law. That there has been, however, an offence against the statute law, and that that offence is an indictable one, is clear. The local legislature has undoubtedly power to declare that a certain act or omission shall be an offence. In *Hamilton v. Massie* (1889), 18 O.R. 585, a breach of a regulation passed under the authority of an Ontario statute was held to be an indictable offence; and see also *Regina v. Lawrence* (1878), 43 U.C.R. 164, and *Regina v. Holland* (1894), 30 C.L.J. 428. There being a breach of the Ontario statute, it is either in itself an indictable offence, under sec. 193 of the Municipal Act, or at the least the provisions of the Criminal Code, sec. 138, apply and make that breach an indictable offence. Apart from this, the breach of a general direction of an Act of Parliament is an indictable offence: *Regina v. Buchanan* (1846), 8 Q.B. 883, at p. 887. The magistrate should, therefore, have taken the information, and should now be compelled to do so.

E. E. A. DuVernet, for the respondent: This is purely a statutory offence, and an indictment will not lie. Before the

amendment in question, voting twice for mayor or reeve was prohibited under a penalty of \$50, to be recovered by suit in the division court. Clearly sec. 193 did not apply then, and it should not be made applicable to the new offence, which is certainly not of a graver nature. The reasonable inference is that the same penalty was intended, and that there has been an oversight in the wording of the section. The Criminal Code, sec. 138, does not apply. The Dominion Parliament cannot make a breach of a Provincial Act an indictable offence, nor can the Provincial Legislature bring within the Dominion criminal procedure an act which the Provincial Legislature chooses to make an offence: *Regina v. Wason* (1890), 17 A.R. 221. The Provincial Legislature cannot make an act a crime, though it can make it an offence and impose a punishment. They have failed in this instance to impose the punishment, but that does not enable the provisions of the Dominion Act to be appealed to. Nor is it correct to say that the breach of a statutory provision in itself constitutes an indictable offence. The contrary has been held in *Regina v. Strong* (1897), 33 C.L.J. 203, and *Regina v. Palin* (unreported), Belleville Assizes, 1st October, 1897, prosecutions under the Dominion Election Act for personation. If the offence is indictable, however, mandamus to the magistrate will not lie, because there is the alternative remedy by proceeding before the grand jury. Nor was there a tender of fees here, and this is sufficient to justify the refusal to take the information: *In re Township Clerk of Euphrasia* (1855), 12 U.C.R. 622. At any rate the magistrate was entitled to exercise his discretion: *Ex parte Lewis* (1888), 21 Q.B.D. 191, at pp. 195-6; *Thompson v. Desnoyers* (1899), 3 Can. Crim. Cas. 68; *Ex parte MacMahon* (1888), 48 J.P. 70; *Rex v. Hughes* (1835), 3 A. & E. 425.

McEvoy, in reply. There are no fees payable in indictable matters, and besides, non-payment of fees was not the ground of refusal. Nor was any discretion exercised; the magistrate should have taken the information, and after that have decided as to his jurisdiction.

TORONTO, April 10, 1902.

ROBERTSON, J.:—It is conceded that falsely personating a voter at a municipal election is not an indictable offence: *Regina v. Hogg*, 25 U.C.R. 66; and by analogy, wrongfully voting twice at the same election would not be indictable *per se*; but the act of voting twice is now by section 158a declared prohibitory, and "Wherever a person does an act which a statute, on public grounds, has prohibited generally, he is liable to an indictment," *per* Lord Denman, C.J., in *Regina v. Buchanan*, 8 Q.B. at p. 887. Then his lordship goes on to say:—"I quite agree that, where, in the clause containing the prohibition, a particular mode of enforcing the prohibition is prescribed, and the offence is new, that mode only can be pursued. The case is then as if the statute had simply declared that the party doing the act was liable to the particular punishment. But where there is a distinct absolute prohibition, the act is indictable."

Here sec. 158a does not contain a particular mode of enforcing the prohibition, and the offence is new; therefore the only remedy is by indictment. It is contended, however, that a penalty is prescribed by sec. 193, sub-sec. 3, of the Municipal Act, but on examination it will be found that the penalty does not apply to the offence of having voted more than once, but only applies to those who have applied for a ballot paper when not entitled to one as set forth in paragraphs (e) and (f). It is true the proposed information in this case charges that Meehan did apply for a ballot paper in his own name, but the gravamen of the charge is that he voted oftener than by law he had the right to do, in violation of sec. 158a. The application for the ballot paper being a necessary preliminary to having voted, the penalty therefor prescribed by sub-sec. 3 of sec. 193 does not apply to the wrongful voting; nor is there any other penalty or mode of punishment expressly provided by law; so that the offence of having wilfully voted more than once without lawful excuse is wilfully doing an act which sec. 158a of

the Municipal Act forbids, and the accused, under sec. 138 of the Code, is guilty of an indictable offence.

Every contempt of a statute is indictable where no other punishment is limited: 2 Hawk. P.C., ch. 25, sec. 4; 5 Burn's Justice, p. 730; and when a new offence is created by one clause of an Act, and a penalty annexed by a separate and substantive clause, a prosecutor may indict on the clause creating the offence, and is not obliged to sue for the penalty: *Rex v. Harris*, 4 T.R. at p. 205; see also *Rex v. Wright* (1758), 1 Burr. 544; 2 Hawk. P.C., ch. 25, sec. 4; 1 Russell on Crimes, 6th ed., p. 199 *et seq.* These cases all refer to new offences, or to offences which Parliament had the power to create, but in this matter the Legislature of Ontario has not the power to create a new offence, except in cases where it prohibits the commission of an act or where it declares an act shall be done or performed on a subject-matter over which it has jurisdiction. Here there is no question as to the power of the Legislature to enact the Municipal Act and to regulate elections thereunder, and to prescribe the penalty or forfeiture for a wilful breach thereof; if such penalty or forfeiture is prescribed, then it must point out by what means it is to be enforced, and that alone is the remedy, and an indictment will not lie. Here there is no penalty or other mode of punishment, and therefore the case comes within sec. 138 of the Code. In the case of *Regina v. Wason*, 17 A.R. at p. 242, much relied upon by Mr. DuVernet (although not on this point), Osler, J.A., in reference to the Act under discussion there, says: "But for the punishment which the Act itself imposes for its breach, its sanction would have been found in that provision of the Dominion Act, R.S.C. ch. 173, sec. 25 (now sec. 138 of the Criminal Code), which enacts that any violation of a provincial statute shall be deemed a misdemeanour and punishable accordingly. Or possibly if the penalty had not been recoverable before justices on summary conviction, the remedy would have been given in sec. 8, sub-sec. 31, R.S.O. 1887, ch. 1, the Interpretation Act." In this matter, however, the Interpretation Act would not apply, for the reason

That a pecuniary penalty of forfeiture is not imposed, so that its sanction is only to be found in the 138th section of the Code. I am, therefore, of opinion that the police magistrate had jurisdiction to take the information in question, and to issue a summons to Meehan to appear and answer the charge; and to hear and determine whether there was a case made out to warrant a committal for trial, etc.; and, moreover, that he was bound to do so, and being so bound, I cannot see how I can decline to make the order absolute. Whatever may be urged in mitigation of the offence charged is not the question before me. It is not a case in which the magistrate, after hearing the facts, *exercised a discretion, which he certainly would have a right to do*, and had refused to take or receive the information: he himself says, in his affidavit filed, that he had considered the question of jurisdiction fully, and had decided in a former case "That I had no jurisdiction either to dispose of the case summarily, or to hold a preliminary investigation and determine whether the defendant should be committed for trial, or not." He did not exercise any discretion at all as to the facts; he came to the conclusion that he had no jurisdiction to consider them, which is a question of law. If he had considered the facts and exercised a discretion upon that state of things, then there might be something in the objection urged by Mr. DuVernet. Where justices entertained an application for a summons for a criminal offence, and have considered the material on which the application is based, and refused to hear more, or to grant the summons, the High Court will not interfere by mandamus to order them to hear again: *Ex parte MacMahon*, 48 J. P. 70. This was an application for a mandamus to a magistrate to exercise his jurisdiction in granting summonses against five persons for the crime of wilful and corrupt perjury. In giving judgment Lord Coleridge said: "If he, the magistrate, has not exercised his jurisdiction, this court will compel him to do so, for parties have a right to his exercise of that jurisdiction, and he has no right to refuse to do so. But if it has been exercised, however

erroneously, this court, which is not a court of appeal from the magistrate, has no power whatever to correct or review his exercise of his jurisdiction." He appears to have stated that he refused the application for the summons because he was satisfied after reading the information that the charge of wilful perjury was not made out; that is, that the statements made by the accused were not wilfully false. If that was not an exercise of discretion on the facts before him, I am at a loss to understand what would be.

In my judgment, before a magistrate can exercise his discretion, he must have jurisdiction to entertain the case, and must have been put in possession of the facts on which he can exercise discretion; but here the police magistrate did not place himself in the position to so act: he felt and considered that he had no jurisdiction to entertain the case, and refused on that ground to take the information or grant the summons. Now that is the point where, according to Lord Coleridge, he was in error, and being in error in that regard, "this court will compel him to correct the error, because parties have a right to the exercise of that jurisdiction." "There is a broad distinction between magistrates declining to exercise jurisdiction and exercising it honestly, but erroneously," *per* Mathew, J., in the same case. If the duty is of a judicial character its performance will be enforced only where it has been refused, and not where it has been improperly performed: *Regina v. Middlesex Justices* (1839), 9 A. & E. 540, at p. 546. I also refer to *Regina v. Richards* (1851), 20 L.J.Q.B. 351; *Rex v. Yorkshire Justices* (1823), 2 B. & C. 286, at p. 291; *Regina v. Worcestershire Justices* (1854), 3 E. & B. 477.

It follows from all this that the police magistrate, in my judgment, has misconstrued the statute in coming to the conclusion that he has no jurisdiction, and it is my duty to make the order absolute; as to which see *Regina v. Cloete* (1890), 64 L.T.N.S. 90; *Regina v. Fawcett* (1868), 11 Cox C.C. 305.

A great number of very technical objections were taken, all of which I have considered, with the cases cited in support

thereof, but no one, in my judgment, was of any force; nor could I give effect to them: the only reason assigned by the police magistrate himself was the want of jurisdiction. It was not because the fees for taking the information, or for granting the summons, or any matter of that kind, were not tendered to him, etc.; and it would be absurd to obstruct the wheels of justice by giving effect thereto. The act required of the police magistrate was a judicial act, and not ministerial, as was the case in *In re Township Clerk of Euphrasia*, 12 U.C.R. 622, cited in support of the objection that the applicant had not tendered to the police magistrate the fees to which it was claimed by counsel he was entitled; and, moreover, I do not think that fees could properly be demanded in this case, as the proceedings could not be dealt with summarily. The magistrate should take the information, grant the summons, and if in his opinion the charge was made out, the accused should be committed for trial, or bailed to appear and answer; if, on the contrary, the magistrate should be of opinion that the act was not "wilfully" committed, but under a misapprehension of the law, I do not think he would be bound to commit on the authority of *Ex parte MacMahon*, before referred to.

Nor do I think, since the passing of the Act to protect justices of the peace, R.S.O. 1897, ch. 88, sec. 6, under which the rule *nisi* was granted in this case, that the Courts are so much restricted as formerly in regard to granting the writ of *mandamus*. This provision is supplemental to that of the authority to grant the prerogative writ. Nor do I think the fact that the information tendered to the magistrate stated the offence charged as being contrary to the common law would justify the police magistrate in refusing to take the same; nor does it appear that such entered into his consideration. Now, by the procedure under the Code, Part 46, any allegation as to whether the offence charged is contrary to the statute law or the common law is not necessary, and if stated as it was in this information, the words "contrary to the common law" may be treated as surplusage.

The only question now undisposed of is as to the costs of this motion. It appears that a rule *nisi* was first applied for to a Divisional Court, and was granted; when cause was shewn, it came up before a Divisional Court composed of other Judges, and the objection was taken that the rule should have been applied for to a Judge sitting in single court: that objection was noted, but the argument was continued on the merits, and was very fully gone into by counsel for both parties, and judgment was reserved. The objection to the jurisdiction of the Divisional Court was afterwards disposed of in favour of the objection (see *R. v. Meehan* (No. 1) *ante*.) but the Court stated as the whole case had been very fully argued, if the parties would consent, one of the Judges who heard the case would sit as in single court, and give judgment on the merits, and gave the parties a week to file a consent to that effect. The applicant was willing to consent, but the respondents, through Mr. DuVernet, declined; whereupon the objection was given force to, without prejudice to another application being made in single court, and the rule *nisi* was dismissed without costs. Subsequently the rule *nisi* was granted in single court, and, after several adjournments or enlargements, it came before me. The best part of two days was then exhausted in the re-argument, all of which I think is to be very much regretted; it was an unreasonable waste of valuable time, and would be sufficient, in my judgment, to warrant me in ordering the costs to be paid by the respondents. But, on the other hand, I am satisfied that the police magistrate acted in perfect good faith; and although the respondent Meehan, through his counsel, had a perfect right to oppose the motion by all legitimate means, the refusal to act on the suggestion of the Divisional Court has had the effect of putting the applicant to unnecessary expense. Besides this, a number of affidavits were filed on behalf of the accused, but not one by himself, which were entirely apart from the real question, shewing what the law had been at the election for the previous year; and from which it was desired to be inferred that it was not a wilful breach of the amended law, but an innocent over-

sight in not recognizing the change that had been made by the amending section 158a. On this motion, my judgment could not be affected by that fact, whatever force the police magistrate may give to it on hearing the case. I do not see, therefore, how I can avoid ordering the respondent Meehan to pay the applicant's costs.

I have to express my thanks to Mr. Cartwright, K.C., Deputy Attorney-General, who, as *amicus curiæ*, referred me, upon the argument, to a number of most important cases bearing on the question.

Order absolute for mandamus.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

THE KING v. LAURIN (No. 1.)

Homicide—Dying declaration—When admissible in evidence—Sense of impending death—Scope of declaration—Statement of fact of injury—Identification of assailant—Attendant circumstances preceding the assault—Statement of distinct transaction not immediately connected with the homicide inadmissible.

1. Proof of a dying declaration in a homicide case must be restricted to the transaction from which the death ensued but may include all facts immediately connected therewith, and a statement of the circumstances which immediately preceded the fatal injury.
2. That part of a dying declaration which states a distinct transaction not immediately connected with the homicide is not admissible in evidence.
3. A dying declaration is admissible in evidence either for the prosecution or for the prisoner in a homicide case.
4. To admit a dying declaration in a homicide case it is requisite that the declarant must have been not only in actual danger of death, but must have had a sense or conviction that his death was impending.

DECIDED: March 17, 1902.

The prisoner was indicted for murder, and on the trial objection was taken by his counsel to the admissibility in evidence as a dying declaration of any statement of the deceased not being a declaration as to the fact of the mortal injury or as to the identification of the party by whom it was inflicted.

MONTREAL, March 17, 1902.

WURTELE, J.:—I need not enter into a long disquisition as to the policy of the provisions of the law, which allows the admission in evidence of dying declarations; it is enough to say that dying declarations must be received with a great deal of circumspection, inasmuch as the accused has not had generally an opportunity of cross-examining the deceased.

Dying declarations are admitted in evidence whenever the declarant has been in actual danger of death; whenever, in the second place, he has a sense or conviction of impending death, and whenever, in the last place, death has ensued; and these three elements must be proved to the satisfaction of the Judge, who, alone, can allow or disallow the evidence, and declare it to be admissible or inadmissible.

In the present case the deceased was really, at the time of the declaration which it is now proposed to prove, in actual danger of death; he had full apprehension of the danger which he was in, and he died within a few hours after the dying declaration was made. These circumstances have been proved to my satisfaction with respect to the declaration which it is now intended to prove. Of course I will not now say anything as to the admissibility of any other declarations that it may be intended to put in evidence. For the present, I declare that the elements necessary to allow the admission of the declaration made by the dying person to his wife have been proved to my entire satisfaction, and I therefore rule that evidence may be given of the dying declaration which was made to her a short time after his admission, in the hospital of the Hotel Dieu.

Objection is now made as to the extent of the declaration, as to what circumstances should be mentioned, as to what part of the declaration the evidence is admissible and should be restricted. It is contended by the learned counsel for the defence that it should be restricted entirely to the fact of the wounding, which was the cause of death, and also to the identification of the person who inflicted the wound, and that other circumstances should be excluded. What is the weight of authority as to these questions? What should I decide in a case like this? I have to be guided by precedents and by the way in which the authors explain the law. In the last edition of the Digest on the Law of Evidence, by Sir James Fitzjames Stephen, on p. 36, he says that declarations made by the declarant as to the cause of his death, and as to the circum-

stances of the transaction are relevant and therefore admissible. I would also refer to the authors which were cited by the learned counsel for the prosecution, on the law of evidence, and I find there that dying declarations are admissible to prove the cause and the circumstances of the death, but not previous or subsequent transactions, although they may be relevant.

The American authors also shew that in America, the same opinion prevails; that dying declarations are admissible with respect to the *res gestae*; that is to say, that they are restricted to the act of killing and the circumstances immediately attending it; but distinct and separate transactions which occurred before or after the commission of the acts are not pertinent or relevant, and cannot be proved by the dying declaration.

I will now refer to the book cited by the learned counsel for the defence, the third volume of Russell on Crimes, and I find, on p. 394, the following words:—"The declarations of the deceased are admissible only as to those things which he would have been competent to testify, if sworn. They must therefore speak as to facts only, and not to mere matters of opinion, and must be confined to what is relevant to the issues." Then, in the last edition of the American and English Encyclopædia, vol. 10, Verbo: Dying Declarations, p. 382, I find this statement: "As to their relevancy, dying declarations are governed by the same rules as testimony, except that they are restricted to the act of killing and the circumstances immediately attending it and forming part of the *res gestae*." Wills, in his work on Evidence, at p. 141, says that the declaration must be confined to the circumstances which led to the declarant's death. The gist of these authorities is: that dying declarations may mention all the circumstances which led to the death, but must not go beyond them.

I am therefore of opinion that the dying declaration must be restricted to the transaction itself from which the death ensued, that any circumstances which occurred before or after and which are independent to the transaction itself must be

excluded, but that such circumstances as form part of the *res gestae* should be admitted in evidence. There is a reason, which to my mind seems conclusive on this point. Russell, in his work on Crimes, states, "that the dying declaration of the deceased is not only admissible against the prisoner, but is also admissible in his favor. Now, for a dying declaration to avail in favor of the prisoner, it is absolutely necessary that the circumstances under which the blow was given and those immediately preceding it, should be put in evidence, and therefore that they should form part of the dying declaration; the prisoner would get no benefit from the bare statement that a blow was given from which the declarant died and that it was given by a person who was named. The dying declaration may be available for or against the Crown, or for or against the accused, and therefore it is necessary that a statement of the circumstances which immediately preceded the blow and which form part of the transaction or *res gestae* should be admitted in evidence. If the accused is to derive any benefit from the dying declaration, proof of all such circumstances must be allowed.

For these reasons I rule that the proof of a dying declaration must be allowed which gives all the facts immediately connected with the event.

With respect to separate transactions, I read in a book which I could not lay my hand on to-day that a dying man had stated that the prisoner had left him and had gone to his house to get a revolver; and that he had on many previous occasions noticed that he had a revolver in his possession. The Court held, in that case, that the evidence could be allowed that the man had gone into his house to get the pistol as that fact was immediately connected with the fact of the killing, but that proof could not be allowed of the fact that he had on many previous occasions seen a pistol in the prisoner's possession as such fact was a separate transaction, and altogether outside of the *res gestae*.

I rule, therefore, that in putting the dying declaration in evidence all the facts and circumstances immediately connected with the homicide may be mentioned; but anything beyond that, any separate and distinct transaction outside of that must necessarily be excluded.

The question is therefore allowed.

Objection overruled.

Note: Dying declaration as evidence on a homicide charge.

In trials for murder or manslaughter, the dying declarations of the deceased made under a sense of impending death are admissible to prove the circumstances of the crime. *E. v. McMahon*, 18 Ont. R. 502. The declarations are not admissible upon charges other than homicide, or as to homicides other than that of the declarant. *E. v. Hind*, 29 L.J. M.C. 147; *E. v. Mead*, 2 B. & C. 605.

The deceased must be proved to the satisfaction of the judge to have been, at the time of making the declaration, (a) in actual danger of death and (b) to have abandoned all hope of recovery. If these conditions concur, it is immaterial that he lingered for several days or even weeks; *E. v. Bernadotti*, 11 Cox C.C. 316; *Craven's Case*, 1 Lew. 77; or that he subsequently entertained hope. *E. v. Hubbard*, 14 Cox C.C. 565; *E. v. Davidson*, 1 Can. Cr. Cas. 351 (N.S.). The question as to whether there was a settled hopeless expectation of death is for the presiding judge. *E. v. Woods*, 2 Can. Cr. Cas. 159 (B.C.). The whole of the surrounding circumstances including the nature and extent of the wound and its immediate result are to be considered. *E. v. Davidson*, 1 Can. Cr. Cas. 351 (N.S.). In a shooting case the declaration of the deceased that he was shot in the body and was "going fast" was held a sufficient indication of the settled and hopeless consciousness of the declarant that he was in a dying state. *Ibid.*

The settled hopeless expectation of death must not be qualified by any prospect of recovery, however slight. *E. v. Jenkins*, L.R. 1 C.C.R. 187; *E. v. Peel*, 2 F. & F. 21; *E. v. Gloster*, 16 Cox C.C. 471.

The expectation of the declarant must be of impending and almost immediate death as distinguished from a deferred one. *E. v. Forester*, 10 Cox C.C. 368; *E. v. Cleary*, 2 F. & F. 850; *E. v. Gloster*, 16 Cox C.C. 471; *E. v. Neill* (1892), Cent. Cr. Ct., sess. papers 1417; and it has been held in some cases that the belief must be in an immediate death. *E. v. Osman*, 15 Cox CC. 1; *E. v. Mitchell*, 17 Cox C.C. 503.

The declaration is admissible only to prove the cause and circumstances of death and not to prove previous or subsequent transactions, although such transactions may be relevant. *E. v. Mead*, 2 B. & C. 605; *E. v. Hind*, 8 Cox C.C. 300, 29 L.J.M.C. 147; *E. v. Murton*, 3 F. & F. 492; *Montgomery v. State*, 80 Ind. 338; *People v. Fong*, 5 Cr. Law Mag. 64.

Declarations of opinion exculpatory of the prisoner have been admitted. *E. v. Scaife*, 1 Mo. & Rob. 551; *Haney v. Commonwealth*, 5 Cr. Law Mag. 47.

The declaration may be oral or written, and a deposition read over to and signed by the deponent may be admissible in evidence as a dying declaration, although irregular as a deposition under sec. 687 of the Code

because taken in the absence of the accused. *R. v. Woods*, 2 Can. Cr. Cas. 159 B.C.; but, *semble*, its weight as evidence is impaired by that fact. *R. v. Woodcock*, 1 East P.C. 356.

An unfinished statement or one which the declarant shewed an intention to qualify but was prevented from so doing, will not be admitted. *State v. Johnson*, 40 Am. St. Rep. 405.

The actual words of the deceased must be proved, and not merely their substance. *R. v. Mitchell*, 17 Cox C.C. 503.

If made in response to leading questions or only upon earnest solicitation these facts will be taken into consideration in giving weight to the declaration as evidence. *R. v. Smith*, 10 Cox C.C. 82; *R. v. Fagent*, 7 C. & P. 238. If given in answer to questions, both the questions and the answers must be proved so that it may be seen how much was suggested by the questions and how much spontaneously given by the declarant. *R. v. Mitchell*, 17 Cox C.C. 503, per Cave, J.

As to the impeachment and contradiction of dying declarations, see note in vol. I., Can. Cr. Cas. p. 363.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE SIR JOHN ALEXANDER BOYD, CHANCELLOR,
AND MR. JUSTICE FERGUSON,
SITTING AS A DIVISIONAL COURT.

THE KING v. COLE.

Estreat of recognizance—Common law offence—Inciting to give false evidence—Counselling or procuring perjury—Subornation of perjury—Common law offences not provided for in the Criminal Code—Jurisdiction—When one justice may admit to bail—Cr. Code secs. 7, 61 (d), 530, 601, 641.

1. Counselling a person to commit perjury is not subornation of perjury unless the perjury is actually committed, but it is punishable as an incitement to give false evidence which is an offence at common law.
2. It is an offence at common law to offer money to a witness to testify regardless of its truth or falsehood, to certain allegations which are false, although not shewn to be false to the knowledge of the accused, and although the proposed testimony was not in fact given.
3. The common law jurisdiction as to crime is still operative notwithstanding the Criminal Code, but subject to the latter prevailing where there is a repugnancy between the common law and the Code.
4. Where the charge in respect of which the accused person has been committed for trial is an offence at common law not provided for by the Code and formerly a misdemeanor, one justice of the peace may commit for trial and admit to bail as at common law.

ARGUED: December 3, 1901.

DECIDED: February 12, 1902.

THIS was a motion to make absolute a rule *nisi* calling upon the Attorney-General of the Province of Ontario to shew cause why the estreat roll upon the recognizance of bail entered into by Oliver Cole and A. F. Bowman, and the writ of *fieri facias* and *capias* thereupon issued, and all proceedings to estreat the said recognizance or enforcing against the said bail, the estreating thereof should not be set aside, and all proceedings thereon stayed, upon the ground that the said recognizance of bail was accepted by one justice of the peace contrary to the provisions of section 601 of the Criminal Code, and that the recognizance was therefore invalid and could not be estreated.

The recognizance recited that "the said Oliver Cole did .
offer the sum of two hundred dollars each to Samuel and

Sylvester Cole if they would swear that George Smith or . . . or either of them gave them the sum of five dollars to vote . . . ,” etc.

Oliver Cole was admitted to bail by one justice of the peace to appear and answer, etc. He did not appear after the bill was found.

At the assizes held at Walkerton on 15th April, 1901, before ROBERTSON, J.

R. N. Ball, for the Crown, moved to estreat the recognizance of A. F. Bowman, who, with the accused, had entered into a bond for the due appearance of the accused to answer the charge, etc.

J. F. Palmer, for Bowman, objected, and contended that the defendant being liable to be sentenced to imprisonment for more than five years, the recognizance was void, as it was taken before one justice of the peace only, contrary to the first part of section 601 of the Code.

Ball, in reply, contended that the crime charged was not perjury or subornation of perjury, but an unlawful attempt to incite, procure, counsel and induce the person named to commit perjury, and that the person accused was not liable to be imprisoned for more than five years, but for a term less than five years, viz., one year under section 530 of the Code for inciting, etc., there being no provision for inciting to take a false oath in the case set out in the charge.

WALKERTON, April 16, 1901.

ROBERTSON, J.:—The defendant was charged in the indictment found by the grand jury for that he “did unlawfully attempt to incite, procure, counsel and induce one Sylvester Cole unlawfully, willingly, knowingly, and corruptly to commit the crime of perjury,” etc.

I have considered this matter, and am of opinion that the contention of the counsel for the Crown is right.

The charge is not under sections 120 nor 121, nor is it under sections 146, 147, 148 to and inclusive of section 152 as to perjury, but comes under section 530, and an accused is liable to one year's imprisonment who "incites or attempts to incite" any person to commit an offence under any statute for the time being in force and not inconsistent with the Code.

In this case there was only an attempt to incite the person named in the indictment to commit perjury. The crime of perjury was not committed, i.e., the person on whom the attempt was made was not induced to commit perjury.

I think, therefore, the case comes clearly under section 530, and if the accused should be convicted he could not be imprisoned for more than a year. In my judgment, therefore, Mr. Palmer's objection fails, and I must order the recognizance to be estreated.

Order made accordingly.

TORONTO, December 3rd, 1901.

Motion before a Divisional Court composed of BOYD, C., and FERGUSON, J., to make absolute the rule nisi.

Ritchie, K.C., for the motion. The practice in cases like this is settled in *Re Talbot's Bail* (1892), 23 O.R. 65. This case does not come under section 530 of the Code. The words "in force and not inconsistent with this Act," clearly exclude the Code where the offence is provided for in the Code. Inciting to commit perjury is an attempt to commit the crime of subornation of perjury, and the recognizance should have been taken "jointly with some other justice." The punishment under section 146 is fourteen years; under section 528 is seven years. The accused may be punished if he counsels: sec. 61, sub-sec. (d); if he attempts: secs. 64 and 711; *Taschereau's Criminal Code*, 3rd ed., p. 96. This is an offence at common law: *Archbold's Criminal Pleading*, 22nd ed., pp. 3, 1019. At common law there was no limit to the term of imprisonment the Judge might impose; so that the accused, if found guilty of

the charge, as an offence at common law, might have been imprisoned for more than five years. The offence charged is also covered by the Code, and under that more than five years' imprisonment might have been imposed.

John R. Cartwright, K.C., Deputy Attorney-General, contra: Even if this case came under section 601 of the Code, there is no authority that that would make the recognizance bad—the magistrate might be punished, but the recognizance would be good. Apart from the Code, the magistrate would have authority to admit to bail, and this case can be treated apart from the Code, as it is an offence at common law: 1 Russell on Crimes, 6th ed., p. 293; the punishment being fine and the pillory: 1 Hawkins' Pleas of the Crown, 8th ed., p. 437; Taschereau's Criminal Code, p. 96. The Code does not supersede the common law: *The King v. Carlile* (1819), 3 B. & Ald. 161. The offence here is "incitement" not "attempt:" Archbold's Criminal Pleading, 22nd ed., p. 1019. As to the powers of magistrates, see 2 Hawkins' Pleas of the Crown, p. 157, section 54.

Ritchie, in reply.

TORONTO, February 12, 1902.

BOYD, C.:—To counsel and procure a person to commit an offence constitutes the counsellor or inciter a party to the offence, when *it is committed*. And by our Code he can be proceeded against as a principal: Code, sec. 61 (*d*); *The Queen v. Gregory* (1867), L.R. 1 C.C.R. 79, and *Benford v. Sims*, [1898] 2 Q.B. 641.

Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed: Code, sec. 145 (4).

In this case no evidence was given under oath, and no perjury was committed, and apart from the Code, the proper course in the case would be to indict as at common law for the misdemeanour of *inciting* to commit perjury.

As put by Grose, J., in *The King v. Higgins* (1801), 2 East 5: "The incitement, . . . is the offence, though differing in its consequences, according as the offence solicited . . . is committed or not:" p. 18.

This motion is made upon what is disclosed in the information, evidence before the magistrate, the recognizance of bail, and the indictment found by the grand jury, the estreat roll and the writs of execution thereon.

But, for the purpose of determining the validity of the recognizance, on the objection made that it does not conform to the requirements of section 601 of the Code, we must, I think, regard only the contents of the record itself, as estreated.

The magistrate's warrant is not before us, but it is required to be set out as to substance in the recognizance, and no variance is alleged.

Now, the condition of the recognizance is thus expressed: "Now the condition of the said above written recognizance is such, that whereas the said Oliver Cole was this day charged before the justices above mentioned: for that he the said Oliver Cole did at Southampton, on the 7th day of January instant, offer the sum of two hundred dollars each to Samuel and Sylvester Cole if they would swear that George Smith, C. R. Vanston or James Johns, or either of them, gave them the sum of five dollars to vote for Alex. McNeill at the last general election for the House of Commons of Canada.

"If, therefore, the said Oliver Cole will appear at the next court of competent jurisdiction to be holden in and for the county of Bruce, and there surrender himself into the custody of the keeper of the common gaol there, and plead to such indictment as may be found against him by the grand jury for and in respect to the charge aforesaid, and take his trial upon the same, and not depart the said court without leave, then the said recognizance to be void or else to stand in full force and virtue."

What is therein charged is the offering of money, in order that (presumably false) evidence should be given by the witness

—though the falsity is not in terms stated—still, as it stands, it would appear to charge an offence in the nature of a misdemeanour.

Thus, in Archbold's Criminal Pleading, 22nd ed., p. 1019, it is laid down that "It is a misdemeanour to incite a witness to give particular evidence, when the inciter does not know whether it is true or false. . . . The offence differs from subornation in that it is not necessary to prove that the evidence was in fact given, or was actually false to the knowledge of the witness." To the same effect is the language of Holt, C.J., in *The Queen v. Darby* (1702), 7 Mod. at p. 101: "It seemed to be a common law offence, to offer money to swear to a particular thing whether true or false."

What is set out in the recognizance is not an attempt to commit the crime of subornation of perjury, as was argued, but something less, being an incitement to give false evidence or to give particular evidence, regardless of its truth or falsehood; that is a misdemeanour at common law, punishable by fine and infamous corporal punishment: 1 Russell on Crimes, 6th ed., p. 293.

In such a case, it is competent for a single justice of the peace to commit for trial and also to admit to bail as at common law. It is noted in 3 Viner's Abr. Title "Bail," (L.) 1, that one justice may bail a man for a misdemeanour to appear at the quarter sessions. And see generally as to this power of one justice of the peace in such cases: Petersdorff on the Law of Bail, pp. 479, 480, and particularly 488.

In this case the recognizance is good at common law: see *per Holt, C.J., The Queen v. Ewer* (1702), 7 Mod. 10.

This same ground as to the invalidity of the instrument was urged before Mr. Justice Robertson at the assizes by counsel for the surety, but it was overruled by him and the order issued that the recognizance should be estreated.

It may be that the same matter without appeal can be again raised in this Court after the estreat by virtue of sec. 14 of the Act, R.S.O. 1897, ch. 106, but as no objection was raised, the

matter has been considered afresh upon the recognizance itself disembarassed from the indictment found.

It was urged that the indictment, as presented, disclosed the offence to be an attempt to commit subornation of perjury; but the learned Judge held that it fell under section 530 of the Code, as being an attempt to incite a person to commit perjury, for which the penalty was one year's imprisonment.

In this view he is supported by the high authority of Mr. Justice Taschereau in his comment on the Code, 3rd ed., p. 96. I have not deemed it necessary to consider this aspect of the case, for it was competent for the grand jury to go beyond the charge contained in the magistrate's commitment, if founded upon the facts or evidence disclosed in the depositions: Code, section 641.

As to any such variance, the bail have no ground to complain; for they are bound in a sum certain, and not to stand in the place of the principal: and his failure to appear is the cause of the forfeiture of the recognizance. See *The Queen v. Ridpath* (1714), 10 Mod. 152.

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the latter law: *The King v. Carlile*, 3 B. & Ald. 161. But here the offence, as set forth in the recognizance, is not specified in the Code, and the power of the justice may be exercised as at common law in liberating the prisoner into the hands of a bailman.

The rule *nisi* is discharged with costs.

FERGUSON, J., concurred.

Rule discharged.

Note: *Procedure for offences at common law apart from the Code.*

Sec. 7 of the Criminal Code provides that all rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under the Code except in so far as they are thereby altered or are inconsistent therewith.

Note:—Continued.

Besides a provision to the same effect the English draft Criminal Code, upon which the Canadian Code was modelled, contained a clause abrogating the common law as regards any possible offences not included in the draft Code, and that seems to have been one of the principal grounds upon which the draft Code was rejected by the British Parliament. No such clause was incorporated in the Canadian Criminal Code and offences at common law may still be prosecuted for in Canada, where the Code neither makes provision to the contrary nor deals with the like offence. But as to matters of mere procedure it is submitted that such provisions of the Code control, in so far as they can be made applicable, the procedure in respect of such common law offences as well as in respect of offences under the Code. Secs. 577 to 607, inclusive, forming Part XLV. of the Code, "Procedure on appearance of accused," purport to deal with preliminary enquiries by justices in any case in which "any person accused of an indictable offence is before a justice whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence," sec. 577. And although sec. 558 in Part XLIV. as to informations and the process to compel appearance before a justice is, by its terms, limited to indictable offences against the Code, its provisions may be taken as ancillary only to the more general power contained in sec. 554 to compel the attendance of the person accused of having committed "an indictable offence" within certain territorial limits. Furthermore it would seem that the power of the justice under Part XLV. when the accused is before him is not restricted to cases in which sec. 558 or other sections of Part XLIV. would apply.

[COURT OF KING'S BENCH, MANITOBA.]

BEFORE KILLAM, C.J., DUBUC AND BAIN, JJ.

THE KING v. HURST.

Fraudulent concealment and removal of goods—Evidence of removal or taking—Evidence of removal of part a month prior to date charged in count—Count to be for one offence only—Separate transactions—No presumption that a continuous act—Time of offence of concealment—Judge's charge—Error in leaving to jury the first taking not included in the count—Conviction for fraudulent removal set aside—Code secs. 354, 611.

1. A conviction on a charge of fraudulent concealment of goods with intent to defraud an insurance company will not be set aside because it appears in evidence that a part of the goods had been removed a month before the date of removal of the remainder, which latter removal took place on the date charged in the indictment as the date of concealment.
2. The date of removal is not necessarily the date of concealment, and the conviction would be valid if the accused were still keeping the goods in concealment on or about the date charged in the count, although the removal took place a month prior thereto.
3. On a further count for fraudulent removal of goods with intent to defraud, a removal of part of the goods a month prior to the time of the offence as charged is not to be presumed to be a part of one continuous taking with the removal of the remainder on the date charged.
4. Although evidence of the first taking was admissible to shew the intent on the second taking which constituted the charge against the accused, the Judge should not have told the jury that they could convict for either the first or the second taking or for both, and the Judge having certified his opinion that the jury were materially influenced by the evidence of the first taking the conviction on the count for fraudulent removal should be set aside.

ARGUED: December 6, 1901.

DECIDED: December 21, 1901.

Crown case reserved. The following case was stated by Richards, J., before whom the accused were tried with a jury at the Winnipeg Fall Assizes of 1901, and convicted on the two counts therein set forth.

"At a sitting of His Majesty's Court of King's Bench for Manitoba, held at Winnipeg for the trial of criminal matters and proceedings for the Eastern Judicial District, commencing on the fifth day of November, one thousand nine hundred and one, the accused, Samuel G. Hurst and Sarah C. Hurst, were indicted and tried before me on the charges contained in the

fourth and fifth counts of an indictment, which counts were as follows:—

4. And the jurors aforesaid do further present, that the said Samuel G. Hurst and Sarah C. Hurst, on or about the eleventh day of September in the year of our Lord one thousand nine hundred, at the said town of Emerson, unlawfully removed a large quantity of household goods belonging to the said Sarah C. Hurst capable of being stolen from a certain dwelling house in said town for a fraudulent purpose, to wit, for the purpose of obtaining from the Hartford Fire Insurance Company, in which said goods were insured in favour of said Sarah C. Hurst, insurance money upon said goods, as if they had been destroyed by a fire by which said dwelling was destroyed on said day, and of their keeping the said goods for their own use.

5. And the jurors aforesaid do further present, that the said Samuel G. Hurst and Sarah C. Hurst, on or about the eleventh day of September in the year of our Lord one thousand nine hundred, and on subsequent days at the said town of Emerson and other places in the said Eastern Judicial District, unlawfully concealed a large quantity of household goods belonging to the said Sarah C. Hurst, capable of being stolen, for a fraudulent purpose, to wit, for the purpose of obtaining from the Hartford Fire Insurance Company, in which said goods were insured in favour of said Sarah C. Hurst, insurance money upon said goods as if they had been destroyed by a fire, which occurred on said day, and of their keeping the said goods for their own use.

The evidence shewed that the dwelling house referred to in said counts was one and the same dwelling house and that the alleged burning or destruction of same and of the alleged goods therein as referred to in said counts was one and the same burning or destruction.

The evidence further shewed that at the time of the alleged burning or destruction the said dwelling house was in ordinary occupation by the accused.

The evidence further shewed that the alleged removal from said dwelling house of some of the goods referred to in the

fourth and fifth counts took place on the thirteenth day of August, one thousand nine hundred, and that the alleged removal of the remainder of the said goods took place on the morning of the eleventh day of September, one thousand nine hundred. There was in respect of the goods removed on the thirteenth day of August, one thousand nine hundred, evidence that they were goods covered by the insurance policy under which there would arise the liability for payment of the insurance moneys referred to in the fourth and fifth counts. There was also evidence of the same kind in respect of the goods removed on the eleventh day of September, one thousand nine hundred. In my opinion such evidence as to those so removed on the thirteenth day of August materially influenced the verdict of the jury.

The evidence further shewed that the burning or destruction by fire of said dwelling house, and of whatever contents it may have had at the time of said fire, took place after sunset in the evening of the said eleventh day of September, one thousand nine hundred.

In my charge to the jury I did not distinguish between the goods removed on the thirteenth day of August and those removed on the eleventh day of September, but left it to them in such a way that they could convict on both counts or on either of them, both as to the goods removed on the thirteenth day of August and as to those removed on the eleventh day of September.

The jury found each of the prisoners guilty on both the fourth and fifth counts.

At request of counsel for the accused I reserved, for the opinion of this Court, the following questions:—

1. Could the accused be convicted of the offences charged in the fourth and fifth counts in respect of goods removed from the said dwelling house on the thirteenth day of August, one thousand nine hundred?

2. Could the accused be so convicted in respect of the goods

so removed on the eleventh of September, one thousand nine hundred?"

WINNIPEG, December 6, 1901.

H. M. Howell, K.C., and E. L. Howell, for the prisoners: The fourth count charges the removal only of a large quantity of goods on 11th of September. The evidence shewed the removal was on two days. Possibly, under the count, there could have been a conviction for removal on 13th of August, but there could not be a conviction for the two removals on the same count. By sec. 611, sub-sec. 6 of the Code, every count is to apply only to a single transaction. The evidence did not shew a removal of insured goods on 13th of August, and if necessary, the case should be referred back for a statement on this point. Prisoners should not be estopped by a technicality; the Court should do what is just: *Reg. v. Saunders*, [1899] 1 Q.B. 490. Section 746 (f) of the Code authorizes the Court to make such order as justice requires. In England, if improper evidence were received, the verdict would be set aside: *Reg. v. Gibson*, 18 Q.B.D. 537; *Gibson v. Lawson*, [1891] 2 Q.B. 547. Section 354 of the Code under which the charge arises is among the clauses amounting to stealing. There could not be a conviction under that for removing with the intention of committing a future fraud. See sec. 306, under which came *Reg. v. Hollingsworth*, 2 Can. Cr. Cas. 291. As to an accessory after the fact: 1 A. & E. Ency. of Law 266; *Reg. v. Rowlands*, 8 Q.B.D. 530; *Reg. v. Chapple*, 17 Cox C.C. 455.

George Patterson for the Crown. Section 354 is under Part XXVI. of the Code, p. 114, relating to the punishment of theft and offences resembling theft, committed by particular persons in respect of particular things in particular places. Section 353, the preceding section, relates to the destruction of documents. If there was in fact the fraudulent intent the accused were properly convicted. Evidence of removal on the 13th of August was pertinent to the question of intent. At all events, the conviction

must stand for the removal on the 11th of September. The Crown claims the evidence shewed that the removals were one continuous transaction.

[KILLAM, C.J., here intimated that the members of the Court were all of opinion that nothing had been shewn to warrant an interference with the verdict of the jury upon the fifth count, and that, at most, there was only the question of the conviction on the fourth count].

WINNIPEG, December 21, 1901.

The judgment of the Court was delivered by

BAIN, J.—As we intimated on the argument, the conviction of the accused on the fifth count of the indictment will have to be affirmed. This count charges the accused with unlawfully concealing goods with the fraudulent intent alleged, on or about the 11th of September and on subsequent days; and, as we must suppose that the evidence shewed that the goods were concealed about the date specified, the date when they were removed from the dwelling house is immaterial. Counsel for the Crown stated that, if the conviction was affirmed on this count, it would not be necessary for the Court to answer the questions as to the 2nd and 3rd counts reserved by the learned Judge at the request of the Crown. The questions we have now to consider are those reserved at the request of counsel for the accused so far as they relate to the fourth count.

This count is laid under sec. 354 of the Criminal Code which declares that everyone is guilty of an indictable offence "who for any fraudulent purpose takes, obtains, removes or conceals anything capable of being stolen," and it charges that the prisoners, on or about the 11th of September, 1900, unlawfully removed a quantity of household goods belonging to the prisoner, Sarah C. Hurst, for the purpose of fraudulently obtaining insurance money on the goods as if they had been destroyed by fire.

The learned Judge states that the evidence shewed that some of the goods were removed by the prisoners on the 13th of August, 1900, and that the rest of them were removed on the 11th of September, 1900, and that the goods removed on both these dates were covered by the policy of insurance. He further states that in his opinion the evidence received as to the removal of the goods on the 13th of August materially influenced the opinion of the jury, and that in his charge to the jury he left the evidence to them in such a way that they could convict the prisoners both for the removal of the 13th of August and for that of the 11th of September.

The count charges that the prisoners unlawfully removed the goods on or about the 11th of September; and I do not think that the expression "on or about" the 11th of September would apply to an act done at a time as long previous to that date as the 13th of August. It does not seem to me, either, that it can be inferred from the statement of the case that the two removals were shewn to be so connected that they formed but one continuous act or taking. (See *Reg. v. Firth*, L.R. 1 C.C.R. 172). And, while it is quite likely that the evidence of the removal in August was admissible for the purpose of shewing the intent of the removal specified in the count, I am inclined to think that the learned Judge should not have told the jury that they could convict for the removal in August.

Section 611 of the Code provides (sub-sec. 6) that every count shall in general apply only to a single transaction, and (sub-sec. 4) that it shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him and to identify the transaction referred to. Now here it would seem that, while the count identified the offence which the accused were called upon to meet as having occurred on the 11th of September, at the trial they were called on to meet another distinct charge of an offence which, it was alleged, they had committed on the 13th of August, and the same count was thus made to apply to two separate transactions. The

result could hardly be otherwise than that the prisoners were placed at a disadvantage on the trial of this count; and, as regards this count, I think there may not have been a fair trial. I think, therefore, that the conviction of the accused on this count should be set aside. The conviction on the fifth count is affirmed.

Order accordingly.

Note: *Fraudulent concealment of goods.*

Sec. 354 of the Criminal Code, 1892, provides that:—"Every one is guilty of an indictable offence and liable to two years' imprisonment who, for any fraudulent purpose, takes, obtains, removes or conceals anything capable of being stolen."

The gist of the offence is the concealing for a fraudulent purpose and it is not incumbent on the prosecution to shew that the fraudulent purpose was accomplished. *R. v. Goldstaub* (1895), 10 Man. R. 497. The subject matter of the offence must be something which is "capable of being stolen"; and sec. 303 declares that "every inanimate thing whatever which is the property of any person, and which either is or may be made movable shall henceforth be *capable of being stolen* as soon as it becomes movable, although it is made movable in order to steal it: Provided that nothing growing out of the earth of a value not exceeding twenty-five cents shall (except in the cases hereinafter provided) be deemed capable of being stolen.

The words "capable of being stolen" as used in sec. 354 do not, however, imply that they are capable of being stolen by the accused, but are used in their general sense as in sec. 311 which deals with the statutory offence of theft by a co-owner of the stolen goods. *R. v. Goldstaub* (1895), 10 Man. R. 497.

[COURT OF KING'S BENCH, QUEBEC.]

(CROWN SIDE.)

DISTRICT OF MONTREAL.

BEFORE WÜRTELE, J.

Ex parte JOHN ARMITAGE.

Constitutional law—Pardoning power—Imprisonment in default of paying fine under provincial statute—Remission—Royal prerogative—Governor-General of Canada—Royal Instruction Letters Patent of 5th October, 1878—Montreal City Charter, 62 Vict. (Que.) ch. 58, secs. 240, 487, 517—Cr. Code sec. 966.

1. Fines imposed under the Montreal City Charter belong to the Crown as represented by the government of the Province of Quebec, and not to the City of Montreal, and the city has no power to remit the same.
2. The royal prerogatives cannot be diminished or abrogated by a statute unless they are expressly mentioned therein, but they may be extended by a statute in general terms.
3. *Semble*, the pardoning power is an exercise of the royal prerogative, and unless a statute expressly limits such prerogative, the same is to be exercised by the Sovereign or by his representative (in Canada by the Governor-General) acting under a special delegation of power from the Sovereign, and the remission of a penalty under a provincial statute for default in payment whereof the accused is undergoing imprisonment is an exercise of the pardoning power.
4. *Semble*, the provincial legislature of Quebec has no constitutional power to remit a fine imposed under the Montreal City Charter, for default in payment of which the accused has been sentenced to imprisonment, nor could it remit or authorize the city to remit the fine in such a case were it payable to the city.

MONTREAL, April 11, 1902.

WÜRTELE, J.:—By sec. 240 of the charter of the city of Montreal, being the Act of the Legislature of Quebec, 62 Vict., ch. 58, every person who at a municipal election applies for a ballot paper or presents himself to vote in the name of some other person, is deemed to be guilty of the offence of "personation," and is liable to a penalty of \$500, and in default of payment to imprisonment for six months, and in addition to an imprisonment not exceeding six months. The section contains no enactment specifying to whom the penalty belongs, nor does it enact before what Court or magistrate the prosecution for

the offence of personation should be brought; but sec. 487 of the charter enacts that the Recorder's Court has jurisdiction for the recovery of all penalties resulting from infractions of its provisions.

The petitioner was sued in the Recorder's Court under the name of Henry Armstrong for the recovery of the penalty to which he had become liable for having presented himself on the first day of February last, during the municipal election which was then taking place, to vote in the name of a man named Armstrong, and on the seventeenth day of February last he was convicted of having committed the offence of personation, and was condemned to be imprisoned for the space of one month, and to pay the penalty of \$500, and he was sentenced to a further imprisonment of six months if the penalty should not be paid before the expiration of the imprisonment of one month.

By sec. 517 of the charter it is declared that all penalties recovered in the Recorder's Court for infractions of its provisions belong to the city and form part of its general fund, and then the next section enacts that "To the council alone appertains the right to remit the whole or part of any fine belonging to the city."

After the expiration of the imprisonment of one month, the petitioner being unable to pay the penalty of \$500 was detained in the common gaol for the further imprisonment of six months, and he thereupon petitioned the council of the city and asked it to remit the penalty which he had been adjudged to pay. The finance committee recommended that under the circumstances of the case the city treasurer should be authorized to remit the penalty in order to relieve him from the imprisonment for six months which he had to undergo in consequence of his default to pay it. On the twentieth day of March last the city council adopted the report, but with the proviso that its provisions should not take effect until the morning of the twenty-eighth day of the month.

The Recorder's Court to which the resolution of the city council had been transmitted, refused to grant and issue the necessary order to the keeper of the common gaol for the petitioner's discharge from custody, and he now seeks to obtain his liberation under a writ of habeas corpus, on the ground that the penalty of \$500 which he was condemned to pay to the Recorder's Court was remitted by a resolution of the city council under the power conferred on it by sec. 518 of the charter, and that, having consequently no penalty to pay, the imprisonment of six months has lapsed and his further detention is now illegal and against the liberty of the subject.

The Crown prosecutor, in reply, contended that by legislation subsequent to the enactment of the charter of the city by the Act 63 Vict., ch. 7, the application of the penalties imposed for infractions of its provisions had been changed, and that at the time at which the petitioner incurred the penalty to the payment of which he was condemned it belonged to the Crown, or in other words, to the executive government of the Province of Quebec, and not to the city of Montreal, and that, consequently, the city council had no right nor power to remit it.

Two questions arise on the consideration of this cause:—

1. Has the application of the penalties imposed by the charter of the city of Montreal for infractions of its provisions been changed; do such penalties now belong not to the city but to the Crown, and has the city council consequently lost the right and power of remitting such penalties which it is alleged had been given to it by sec. 518 of the charter?

2. Was the enactment of sec. 518 beyond the authority and power of the Legislature of Quebec and unconstitutional, and therefore inefficacious?

With respect to the first question:—

By the general provincial law, which is contained in article 31 of the Revised Statutes of Quebec, when no other provisions for the application of a penalty have been prescribed, half of

it belongs to the Crown, that is to the executive government of the Province, and the other half to the private prosecutor, but if there is no private prosecutor, then the whole belongs to the Crown.

Section 240 of the charter of the city of Montreal, which imposes a penalty of \$500 on persons who are guilty of the offence of "personation," does not prescribe the application of the penalty and appropriate it; but sec. 487 gave jurisdiction to the Recorder's Court for the recovery of all penalties incurred for infractions of the charter, and sec. 517 declared that all penalties sued for and recovered in the Recorder's Court for such infractions belonged to the city.

The Legislature always has the power to amend, alter or repeal any statute made by it, and article 10 of the Revised Statutes of Quebec, which contains part of the public law of the Province, expressly enacts that every statute is considered as reserving to the Legislature the power of revoking any power, privilege or advantage granted to any person, including, of course, corporations.

The year after the statute granting the present charter of the city of Montreal was passed the Legislature passed the statute 63 Vict., ch. 7, which was assented to on the 23rd March, 1900, and enacted that "no provision in any municipal charter heretofore granted by the Legislature, by which fines are declared to belong to any corporation, shall be deemed to affect the right to such fines or part thereof which the Crown would have had if such provision had not been passed." In this statute the word "fine" is used, but the word "fine" and the word "penalty" are synonymous terms. The Legislature in enacting this statute used the authority it has of revoking any power, privilege or advantage which it may have granted to any municipal or other corporation, and the effect of this statute is to take from the corporation of the city of Montreal the appropriation or assignment which had been made of the penalties which might be incurred for violations of the provisions

of its charter, and might be sued for and recovered in the Recorder's Court, and to restore the law respecting the affectation and appropriation of penalties as it was before the charter was enacted.

Since the enactment of the statute respecting the affectation and appropriation which may have been made of penalties in municipal charters, all fines or penalties incurred for violation of the provisions of the charter of the city of Montreal do not belong to the city, but they belong to the Crown, either in whole or for one half if there should be a private prosecutor. In the present matter there was no private prosecutor, and the penalty incurred by John Armitage under the name of Henry Armstrong, therefore, belongs in whole to the Crown, represented by the executive government of the Province.

Section 518 of the charter purports to give to the council of the city of Montreal alone the right to remit the whole or part of any fine belonging to the city. Now, in the present case neither the whole of the fine or penalty, nor any part of it, belonged to the city, and consequently the council under the very terms themselves of the section had no power to remit it, and the resolution which purports to remit the fine or penalty of \$500 is illegal and null, and without effect.

Now with respect to the second question:—

The Confederation Act, in sec. 9, declares that the executive government and authority of and over Canada is vested in the King. All royal prerogatives are consequently exercised in his name and under his authority by his representative, the Governor-General, who acts under the advice of his ministers. In most cases, the royal prerogatives are exercised by the Governor-General under the general powers conferred upon him, but the prerogative of mercy is exercised under a special delegation of power contained in the royal instructions respecting the execution of his functions.

In administering the prerogative of mercy the Governor-General does not act as a Court of Appeal. In exercising the

royal clemency he may remit a sentence, but he does not technically reverse it nor pronounce it wrong. The act of pardoning is one of pure clemency, and is not the exercise of a judicial power; it is purely and essentially the exercise of a royal prerogative which is exercised by the Sovereign himself, or in his dominions beyond the seas by his representative under a special delegation of power. This delegation, in the case of the Governor-General, is contained in the royal instruction, but if the King saw fit a delegation of this power could be given to any Lieutenant-Governor for matters under the legislative jurisdiction of his Province. (Todd's Parliamentary Government in British Colonies, p. 254).

The prerogative of mercy is simply the exercise of a discretion on the part of the Sovereign to dispense with or to modify punishments which the criminal or penal law required to be inflicted. It is exercised by commutation or by a free or a conditional pardon; but it should not interfere with or infringe private rights. It must not be anticipatory, and it should not do more than relieve the offender from the punishment imposed by the sentence of the Court or magistrate, and must not secure him in the advantage derived from his wrong doing, and for instance relieve him from the liability to vacate an office corruptly acquired. In the self-governing possessions of the British Empire, such as our Dominion, Letters Patent are issued which constitute the office of head of the executive government, and delegate to him the exercise in the King's name of certain royal prerogatives as that of mercy. (2 Anson, Law and Custom of the Constitution, pp. 228, 229, and 257).

Acting on the suggestion of the Honorable Mr. Blake, when he was Minister of Justice, Letters Patent containing permanent instructions for the exercise of the duties and powers of the Governor-General of Canada were issued on the 5th October, 1878. These Letters Patent specially authorize and empower the Governor-General for the time being, in the name and on behalf of the Sovereign, to grant to any offender convicted of

any crime in any Court or before any judge, justice or magistrate within the Dominion a pardon should he see occasion, or a respite of the execution of the sentence of any such offender, for such period as he may see fit, and to remit any fines, penalties or forfeitures which may become due and payable to the Crown, provided that the Governor-General should not pardon or reprieve any such offender without first receiving in capital cases the advice of the Privy Council, and in other cases the advice of one at least of his ministers.

Penalties can only be remitted when they belong to the Crown, as to remit penalties which are affected and appropriated in favor of individuals, and which belong to them, would be an interference with a private right, but the Sovereign may extend the royal mercy to any person who is imprisoned for the non-payment of a penalty which belongs to a person other than the Crown. This rule was established by sec. 125 of the statute 32-33 Vict., ch. 29, and the provision is reproduced in sec. 966 of the Criminal Code. The reason for this provision is that when the person who has been condemned to pay a penalty has been imprisoned for non-payment of the penalty, two principles are in conflict; on the one hand there is the non-interference with private rights, and on the other hand stands the subject's deprivation of his liberty, and the liberty of the subject which the Sovereign should favor, preponderates, if he sees fit to exercise the royal mercy, over the right of a private person to imprison a subject for the purpose of exacting money for the payment of a penalty.

It is a provision of our general public law that the royal prerogatives are not affected nor curtailed in any way by any enactment in a statute, unless they are expressly mentioned or referred to. Article 14 of the Revised Statutes of Quebec declares that "no statute affects the rights of the Crown, unless they are specially induced," and paragraph 46 of sec. 7 of ch. 1 of the Revised Statutes of Canada declares that "No provision or enactment in any Act shall affect in any manner or

way whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby." As an example, I may mention the provision contained in sec. 1 of the statute of Canada, 51 Vict., ch. 43, and reproduced in sec. 751 of the Criminal Code, which abolishes appeals in criminal cases to the Privy Council, that is to say, to His Majesty in Council, which specially state that such appeals are abolished "notwithstanding any royal prerogative."

The same doctrine is to be found in the works of the text writers. For instance, in Potter's *Dwarris*, p. 151, we read: "It is the rule that the King shall not be restrained of a right which he had by the general words of an Act of Parliament if he be not named in the Act. The King is not divested of any of his prerogatives, but by plain and express words for that purpose; he cannot be stripped of any part of his ancient prerogatives, nor of those rights which are incommunicable and are appropriated to him as essential to his regal capacity." And we see in Wilberforce's work on *Statute Law*, p. 36, that "It had always been held in modern as well as in ancient times, that the Crown is not bound by any statute unless it is expressly named. The Crown is not bound by Acts which in general terms divest any royal prerogative or right."

But although a royal prerogative cannot be affected or curtailed by the enactment of a statute, without express words to that effect, it may be enlarged and extended by a statute which does so in general terms.

Section 518 of the charter of the city of Montreal enacts that "to the council alone appertains the right to remit the whole or part of any fine belonging to the city." The right which it purports to give is the power of remitting sentences rendered by duly constituted Courts or magistrates, and this is in effect the power to pardon. Now under the law of the constitution the power to pardon is the exclusive prerogative of the Sovereign, and the power must be exercised by the Sovereign

personally or under an express delegation of authority from himself, and under the public law of the realm this prerogative cannot be interfered with nor in any way lessened by an Act the Legislature unless His Majesty's intention and consent to that effect are shewn by plain and express words. In the present case no waiver of the prerogative of mercy is contained in the section of the charter purporting to give the right to the council of remitting fines.

The section purports to confer a power which appertains by the constitution of the country solely to the Sovereign, of which His Majesty can only be divested in any degree by his express consent, and which under the constitution must be exercised by himself or in virtue of a delegation of power from himself. The power which the section seeks to confer is contrary to a constitutional provision, and to my mind it is beyond the competence of the Provincial Legislature, and is therefore unconstitutional, invalid and without effect.

But it may be objected that as the right purported to be given is to remit fines payable to the city, it does not contravene the royal prerogative of mercy which does not include the power to remit a fine or penalty or the part of a fine or penalty which is payable to some person other than the Crown; but as I have already stated, the royal mercy may be extended in such a case when the offender is imprisoned for non-payment of the money. The scope of the section is general, and would apply to a remission to be granted either before or after imprisonment, and it would therefore affect the royal prerogative, and arrogates to the council the power of pardon in the latter case. As a matter of fact, the resolution of the council of the city of Montreal purporting to remit the fine or penalty of \$500 imposed on the petitioner was passed while he was imprisoned for its non-payment.

A statute may be unconstitutional in part only, and valid as regards the remainder; but in such a case when the parts are so related in substance as to preclude the supposition that

the Legislature would have passed one without the other, or when it appears that the Legislature intended the Act to operate as a whole; the entire statute must be adjudged invalid. It is evident that the intention of the Provincial Legislature in the present case was general. The intention clearly appears to have been that the council should have the right to remit fines payable to the city whether before or after imprisonment for non-payment, and consequently, under the principle which I have just mentioned, sec. 518 of the charter is entirely invalid.

There is, however, another principle which applies to the present matter; it is that the constitutionality of a statute should be determined only when it is impossible to dispose of a cause otherwise on its merits. In the present matter it is possible to do so, and I will therefore not adjudge on the question of the constitutionality of the section; what I have said on this point must therefore be taken merely as my personal opinion.

Lastly on the merits of the cause:—

I adjudge and hold that in consequence of the enactment of the statute 63 Vict. ch. 7, which was assented to on the 23rd March, 1900, the fine or penalty payable by the petitioner did not belong to the city, but belongs to the Crown, and that consequently, under the terms of sec. 518 of the charter, the council had no power to remit it.

The Court, therefore, quashes the writ of habeas corpus.

Habeas corpus quashed.

Note: Pardons and Commutations.

In the pardoning power case of *Attorney General for Canada v. Attorney General of Ontario* (1892) 19 Ont. A.R. 31, the validity of the Ontario statute, 51 Vict., ch. 5, was in question. After a preamble referring to the British North America Act, the Ontario statute had purported to enact as follows:—

“1. In matters within the jurisdiction of the Legislature of the Province, all powers, authorities and functions which, in respect of like matters, were vested in or exercisable by the Governors or Lieutenant-Governors of the several Provinces now forming part of the Dominion of

Note—Continued.

Canada or any of the said Provinces, under commissions, instructions or otherwise, at or before the passing of the said Act, are, and shall be (so far as this Legislature has power thus to enact) vested in and exercisable by the Lieutenant-Governor or administrator for the time being of this Province, in the name of Her Majesty or otherwise, as the case may require; subject always to the Royal Prerogative as heretofore.

“2. The preceding section shall be deemed to include the power of commuting and remitting sentences for offences against the laws of this Province, or offences over which the legislative authority of the Province extends.

“3. Nothing in this Act contained shall be construed to imply that the Lieutenant-Governor or administrator has not had heretofore the powers, authorities and functions in the preceding two sections mentioned.”

The Chancery Division had held that the statute was *intra vires* (20 Ont. R. 222) and this decision was affirmed by the Court of Appeal, and a further appeal to the Supreme Court of Canada was dismissed, Gwynne, J., dissenting. *Atty.-Genl. for Canada v. Atty.-Genl. of Ontario* (1894) 23 Can. S.C.R. 458. The decision however was based upon the fact that the statute in question was self-limitative to the powers which the Legislature had. Sir Henry Strong, C.J., said: “Whatever may have been the proper determination of this question, if the statute had been absolute in its terms, it seems to be impossible to say that an enactment which on its face is expressly made subject to a condition that the Legislature has power to enact it can be *ultra vires*. The effect of such a proviso necessarily is that the Act is by its very terms to be treated as an absolute nullity if beyond the competence of the Legislature; it is therefore impossible to say that there has been any excess of jurisdiction.” There are conflicting dicta in the case as to the scope of the royal prerogative of pardon. Hagarty, C.J.O., in the Ontario Court of Appeal said: “To my mind there is an essential difference between pardons, as universally understood, and the remission or commutation of a term of imprisonment, or of a pecuniary mulct. I do not understand that the discharge of a prisoner from further endurance of his sentence which may occur for various cogent reasons, can properly be looked upon or described as a pardon. The statute here questioned does not mention a pardon, but speaks merely of commutation and remission. I must therefore decline following counsel into the wide field of discussion and its boundless crop of venerable learning as to pardon and prerogative. I have only to deal with the language used in the impugned statute. It seems to me on the whole, that we must hold that the necessary implication from the provisions of the Federation Act must be that the Legislature in this enactment as to commutation and remission has not transcended its legitimate powers. I do not feel pressed by the objection that it is within the restriction (in sec. 92, sub-sec. 1, of the B.N.A. Act) on the powers to amend the constitution, except as to the office of Lieutenant-Governor. I think this is satisfactorily disposed of in the Court below. I have confined

Note—Continued.

these remarks within a narrow limit, as I do not consider that the question submitted warrants us to enter on a larger area of discussion."

But Sir Henry Strong, Chief Justice of Canada, expressed his views as follows (23 Can. S.C.R. 468):—

"Had I been compelled to decide the substantial question argued before this Court, I should have had no hesitation in holding that 'the power of commuting and remitting sentences' mentioned in the second section of the Provincial act in question, was nothing less than the power to pardon.

"By the law of the constitution, or in other words, by the common law of England, the prerogative of mercy is vested in the Crown, not merely as regards the territorial limits of the United Kingdom, but throughout the whole of Her Majesty's Dominions. The authority to exercise this prerogative may be delegated to viceroys and colonial governors representing the Crown. Such delegation, whatever may be the conventional usage established on grounds of political expediency, a matter which has nothing to do with the legal question, cannot however in any way exclude the power and authority of the Crown to exercise the prerogative directly by pardoning an offence committed anywhere within the Queen's Dominions. I take it to be the invariable practice, in the case of colonial governors to delegate to them the authority to pardon in express terms, either by the commission under the Great Seal, or in the instructions communicated to them by the Crown. This being so, and this practice having prevailed as far as I can discover universally and for a long series of years, I should have thought that it at least implied that in the opinion of the law officers of the Crown, an authority on such a point second only to that of a judicial decision, that the prerogative of pardoning offences was not incidental to the office of a colonial governor, and could only be executed by such an officer, in the absence of legislative authority, under powers expressly conferred by the Crown.

"The next question, and one which was argued on this appeal, and which, if we were compelled to decide all the questions presented we should have been obliged to pronounce upon, is one of the greatest importance, not a question of construction arising in any way upon the British North America Act, but one involving a great principle of the general constitutional law of the Empire. That question is: In what Legislature does the power of conferring this prerogative of pardoning by legislation upon a representative of the Crown such as a colonial governor, reside? Is it possessed by any colonial Legislature, including in that term under our system of Federal Government as well the Dominion Parliament as a Provincial Legislature, or is it confined to the Imperial Parliament? That the Crown, although it may delegate to its representatives the exercise of certain prerogatives, cannot voluntarily divest itself of them seems to be a well recognized constitutional canon. Upon this point of the locality of the legislative power to interfere with the royal prerogative, I should have

Note—Continued.

thought that the case of *Cushing v. Dupuy*, 5 App. Cas. 412, and *Re Marois*, 15 Moo. P.C. 189, decided by the judicial committee with reference to the jurisdiction of a colonial legislature to limit appeals to the Queen in Council, would, if not direct authorities, have had at least a very material application to the present question. The judgments delivered in the Supreme Court of Victoria in the case of *Chun Teeong Toy v. Musgrove*, 14 Viet. L.R. 349, might also have afforded us great assistance."

[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE TAYLOR, C.J., DUBUC AND BAIN, JJ.

THE QUEEN V. GOLDSTAUB.

Fraudulent removal or concealment of goods—Person concealing his own goods to defraud fire insurance company—"Anything capable of being stolen"—Interpretation—Fraud not completed—Cr. Code, secs. 303, 354.

1. A person is guilty of an offence under sec. 354 of the Criminal Code if he fraudulently conceals his own goods for the purpose of obtaining insurance moneys thereon, as if they had been destroyed by fire, and of then keeping the goods for his own use.
2. The gist of the offence created by sec. 354 is the concealing for a fraudulent purpose, and it is not incumbent on the prosecution to shew that the fraudulent purpose was accomplished.
3. The subject matter of the offence under sec. 354, i.e., "anything capable of being stolen," is not restricted to things capable of being stolen by the accused, but includes anything which comes within the definition given in sec. 303 of things capable of being stolen.

ARGUED: May 15, 1895.

DECIDED: May 18, 1895.

THE prisoner having elected to take a speedy trial, was tried before Killam, J., on an indictment containing three counts, namely, two of setting fire to a certain building with different specified intents, and thirdly with having unlawfully concealed a large number of goods specified in the indictment, being goods capable of being stolen and being the property of the prisoner of the wholesale value of five hundred dollars, for a fraudulent purpose, to wit, for the purpose of obtaining from

certain insurance companies insurance money upon said goods as if they had been destroyed by fire, and of then keeping the said goods for his own use.

The prisoner was found not guilty upon the first two counts above mentioned, but was convicted upon the third count, subject to the opinion of the Court upon a question reserved for the consideration of the Court.

It was proved that at the time of the commission of the offence charged in the third count, the goods in question were inanimate and movable things, the absolute property of the prisoner, part of his stock in trade, and of the property insured by the insurance companies. These companies had not, nor had any of them, any property or interest in the goods, or in any of them save as such insurers.

Killam, J., found that the prisoner did, at the time and place alleged in the third count, conceal the goods for the purpose of making it appear, and with intent to represent that the goods had been destroyed by the fire, he then well knowing that the same had not been destroyed, and with intent and purpose of keeping the said goods for his own use and of obtaining from the insurance companies the full amount of the insurance moneys, even though the goods actually destroyed should be found to be of less value than the full amount of the insurance moneys. And he found as a fact that the purpose of the prisoner was a fraudulent purpose.

The question which was reserved for the opinion of the Court was as follows:—Was the said Goldstaub, under the circumstances aforesaid, guilty of an indictable offence under the 354th section of The Criminal Code, 1892 ?

N. F. Hagel, Q.C., and *G. A. Elliott*, for the prisoner, cited *Rex v. Webb*, 1 Moo. C.C. 431, and *Reg. v. Poole*, Dears. & B. C.C. 345.

H. A. Maclean, for the Crown, cited *Queen v. Bailey*, L.R. 1 C.C. 347, and *Rankin v. Potter*, L.R. 6 H.L. 119.

WINNIPEG, May 18, 1895.

TAYLOR, C.J.:—The question is raised on behalf of the prisoner: Can a man be convicted of concealing his own goods under the 354th section of the Criminal Code? It is urged that the words "takes, obtains," refer to the goods of another, and, therefore, the other words "removes or conceals" must do so also. It seems to me the section is intended to cover every case, the case of another's goods and the case of the owner's own goods. The terms are certainly wide enough to do so.

The words at the end of the section, "anything capable of being stolen," do not mean anything capable of being stolen by the accused. They seem to me used to indicate that this particular section refers to and includes anything which comes within the definition given in sec. 303. The same expression is used in sec. 311 where theft by a co-owner is dealt with. It is also used in a number of other sections, evidently with the same intention and meaning.

The argument that to put upon this section the construction contended for by the Crown, and to hold the section applicable to the concealment of goods by the owner, involves holding that a debtor who executes a bill of sale or chattel mortgage to defraud his creditors, or a debtor who, knowing that an execution has issued or is about to issue upon a judgment against him, conceals goods so that they cannot be reached by the sheriff, may be convicted under this section, has little force. These are acts dealt with by sec. 368, which makes it an indictable offence, if any one with intent to defraud his creditors, or any of them, removes, conceals or disposes of any of his property. And that section does not create any new offence. It is only a re-enactment of what, I believe, first appeared as sec. 21 of 22 Vict. ch. 96 (C).

It was further argued, that it is quite consistent with the case reserved that no claim was made against the insurance companies, and that the Crown was bound, before the prisoner

could be convicted, to prove that the fraud was carried into effect. The prisoner, it is said, did nothing unlawful when he concealed his own goods, there was nothing unlawful in that, and it does not appear from the case that any claim was made against the insurance companies. But the learned Judge has found as a fact, that the purpose for which the prisoner concealed the goods was a fraudulent purpose, and that constitutes an offence.

In *The Queen v. Bailey*, L.R. 1 C.C. 347, the prisoner, whose property was under seizure from a county court, took from the bailiff the warrants of execution, supposing that when they were out of the bailiff's possession he would have no right to continue in possession, and, on the bailiff refusing to leave, evicted him. On a case reserved it was held that he could not be convicted under a count charging larceny, but the conviction under another count was upheld, because, although his act was wholly ineffectual in accomplishing the purpose which he expected to accomplish, it was done with a fraudulent purpose.

In *Schofield's Case*, Cald. 397, Lord Mansfield said, "So long as an act rests in bare intention, it is not punishable; but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done, and if accompanied with an unlawful and malicious intent, though the act itself would have otherwise been innocent, the intent being criminal, the act becomes criminal and punishable." Caldecott's Reports are not in the library, but the words I have quoted are given in Russell on Crimes, vol. 2, p. 188, and the case is cited, and Lord Mansfield's language quoted with approval, in *The King v. Higgins*, 2 East, 21.

In *Rex v. Sutton*, 2 Str. 1074, where the question of intent is dealt with, *Schofield's Case* is referred to, and the illustration is given by Lee, C.J., "Lading wool is lawful; but if it be with an intent to transport it, that makes it an offence."

Here the learned Judge has found that the concealment of the goods was for a fraudulent purpose, so that even if the con-

cealment was in itself an innocent act the intent and purpose being criminal the act becomes, as Lord Mansfield said, criminal.

The question asked should, in my opinion, be answered in the affirmative and the conviction sustained.

DUBUC, J.:—The contention of the defence is that the goods in question concealed by the prisoner, being his own goods, were not capable of being stolen within the meaning of section 354 of the Criminal Code. It is claimed that the expression “anything capable of being stolen” in said section means anything belonging to another person, because a man cannot be found guilty of stealing his own goods when they are in his actual and exclusive possession.

The words “capable of being stolen” are used there in a descriptive sense, to define the nature of the things which may be the subject of the offence, and not as a constituent ingredient of the said offence. The gist of the crime contemplated by the statute is the act of concealing something having a certain value for a fraudulent purpose, and the words “capable of being stolen” must be taken as defined by secs. 303 and 304 of the Code, to distinguish them from the things, the taking of which does not constitute a theft.

The goods in question here were *in se* goods capable of being stolen; and though the prisoner could not, of course, steal them from himself, he had the inherent right, which every owner has, to conceal, burn, or otherwise destroy his own goods, providing he would do so without interfering with any other person’s right. But when he did conceal them for a fraudulent purpose, for the purpose of defrauding the insurance companies, he did, in my opinion, commit an act declared by sec. 354 to be an indictable offence. He actually concealed, for a fraudulent purpose, something capable of being stolen, within the meaning of said section.

I think the question submitted to the Court should be answered in the affirmative.

BAIN, J.:—The count of the indictment on which the prisoner has been found guilty is laid under sec. 354 of the Criminal Code, which declares that everyone is guilty of an indictable offence, "who, for any fraudulent purpose, takes, obtains, removes or conceals anything capable of being stolen." The prisoner, it appears from the case stated by my Brother Killam, was a merchant, and had his stock in trade insured in several insurance companies. The building in which the goods insured were having been burnt, the prisoner concealed a quantity of the goods that the insurance policies covered with the fraudulent purpose of making it appear that these goods had been destroyed, intending to keep the goods for his own use and at the same time to obtain from the insurance companies the full amount of the insurance, even though the goods actually destroyed should be found to be of less value than the full amount of the insurance; that is, he intended to cheat the insurance companies into paying the insurance as if the goods he concealed had been destroyed in the fire.

The provisions of this sec. 354 are new, and, as counsel for the prisoner say, they may have been intended to cover cases such as *Regina v. Holloway*, 1 Den. C.C. 371, and *Regina v. Poole*, Dears. & B. C.C. 345. But the attempt to defraud that we have in the case before us is one that it may well be supposed Parliament intended should be made a criminal offence; and while the case certainly seems to fall within the reasonable meaning of the terms of the section, I can see no good reason why it should not be held to be within its spirit also. I think the last words of the section, "anything capable of being stolen," are intended to be merely descriptive of the property or things to which the section is applicable, and do not indicate that the things taken or concealed must be the property of some one else than the person charged with the offence. It is urged that it was incumbent on the Crown to have shewn that the fraudulent purpose was accomplished. But the gist of the offence created by the section is the concealing for a fraudulent purpose, and that is what has been proved. In such a case as this,

if the fraudulent purpose of the concealment had been accomplished, the case would come within the provisions against obtaining money by false pretences, and there would be no need for the provisions of the section.

I think the question asked by the learned Judge must be answered in the affirmative.

Conviction affirmed.

Note: Interpretation of Criminal Statutes.

The most firmly established rules for construing an obscure enactment are those laid down by the Barons of the Exchequer in *Heydon's case*, 3 Co. Rep. 8, which have been continually cited with approval and acted upon. *The Solio case* [1898] App. Cas. 571, 573; *Miller v. Solomons* (1852), 5 Ex. 475; *Attorney General v. Sillem* (1863), 2 H. & C. 431; *R. v. Castro* (1874), L.R. 9 Q.B. 350; *Davis v. Kennedy* (1869), Irish R., 3 Eq. 668, 693.

Those rules are as follows:—"That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: (1) What was the common law before the making of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; (4) the true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy and to suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*."

These rules are still in force and effect, with the addition that regard must now be had not only to the common law but also to prior legislation and to the judicial interpretation thereof. Hardcastle on Statute Law (1901), 3rd ed. 109.

But Pollock, C.B., stated in *Attorney-General v. Sillem* (*the Alexandra case*) (1863), 2 H. & C. 509, that the penal statutes alluded to in those rules are statutes which create some disability or forfeiture, and not such as create crimes, and he added that "No calamity would be greater than to introduce a lax or elastic construction of a criminal statute to serve a special but a temporary purpose."

Penal statutes must be construed strictly, and where an enactment imposes a penalty for a criminal offence, a person against whom it is sought to enforce the penalty is entitled to the benefit of any doubt which may arise in the construction of the enactment. *London County Council v. Aylesbury Dairy Co.* [1898], 1 Q.B. 106, 109, Wright, J. Huddleston

Note:—Continued.

B., thus expressed the rule in *Rumball v. Schmidt* (1882), 2 Q.B.D. 608, "Where there is an enactment which may entail penal consequences you ought not to do violence to the language in order to bring people within it, but ought rather to take care that no one is brought within it who is not brought within it by express language."

Words are to be construed with reference to their context. Their meaning is to be ascertained by reference to the whole Act including, if necessary, the preamble. *Colquhoun v. Brooks* (1889), 14 App. Cas. 493. But a section having effect as a substantive enactment is to be first considered, and it is only in a second or last resort that the rest of the statute, or the preamble, or the scheme of governing intention is to be regarded. *Spencer v. Metropolitan Board of Works* (1882), 22 Ch. D. 142, 162, Jessel, M.R.

The person charged has a right to say that the thing charged although within the words is not within the spirit of the enactment; but where the thing is brought within the words and within the spirit, there a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used, and the Court is not to find or make any doubt or ambiguity in the language of a penal statute, where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument. *The Gauntlet* (1872), L.R. 4, P.C. 184, 191.

Sec. 354 of the Code is in the following terms:—"Every one is guilty of an indictable offence and liable to two years' imprisonment who, for any fraudulent purpose, takes, obtains, removes or conceals *anything capable of being stolen*."

This latter phrase also appears in sec. 311, which enacts that "Theft may be committed by the owner of *anything capable of being stolen* against a person having a special property or interest therein, or by a person having a special property or interest therein against the owner thereof, or by a lessee against his reversioner, or by one of several joint owners, tenants in common, or partners of, or in any such thing against the other persons interested therein, or by the directors, public officers or members of a public company or body corporate, or of an unincorporated body or society associated together for any lawful purpose against such public company or body corporate or unincorporated body or society."

It is plain that under sec. 311 the words "anything capable of being stolen" are used in a general sense having reference only to the class of article and not to the conditions of ownership, the intention of that section being to make that theft when committed by a co-partner or co-owner against the other partner or co-owner which would have been theft had the defrauded party owned the chattel in entirety.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HONORABLE SIR JOHN ALEXANDER BOYD, CHANCELLOR,
AND THE HONORABLE SIR WILLIAM RALPH MEREDITH, C.J.C.P.,
SITTING AS A DIVISIONAL COURT.

THE KING v. ST. PIERRE.

Ontario Summary Convictions Act—Municipal by-law—Transient traders' license—Goods ordered to be made from samples—"Offering goods for sale," meaning of—Statutory restriction of certiorari—2 Edw. VII. (Ont.) c. 12, s. 14—Application of—Want of jurisdiction over subject matter of complaint—Ontario Municipal Act, R.S.O. 1897, c. 223, s. 583.

1. The Ontario Municipal Act, R.S.O. 1897, c. 223, s. 583, does not require a transient traders' license from a person who engages a room at a hotel and there solicits orders for clothing to be made up from samples of cloth exhibited, and to be forwarded when made up to the customer.
2. Such a person is not a "hawker" or "pedlar" under the Municipal Act, and a transient trader cannot be said to "offer" goods for sale within the meaning of the statute unless there is some visible presentation of the goods themselves which are the subject of the sale.
3. The Ontario statute 2 Edw. VII. (1902) c. 12, s. 14, which declares that no conviction under the Ontario Summary Convictions Act shall be removed by certiorari except upon the ground that an appeal would not afford an adequate remedy does not prevent the granting of the writ where the magistrate had no jurisdiction over the matter adjudicated.

ARGUED: May 14, 1902.

DECIDED: May 15, 1902.

ON the 5th March, 1902, an information was sworn before the police magistrate for the city of Ottawa, that William St. Pierre, of the city of Montreal, on the 5th March, 1902, at the city of Ottawa, then and there a transient trader, temporarily occupying premises in said city, and not being entered upon the assessment roll of the said city in respect of income or personal property for the then current year, did unlawfully offer for sale goods, to wit, ladies' clothing, within the limits of the said city of Ottawa, without having first duly taken out a license for that purpose, contrary to the by-law of the corporation of the said city of Ottawa in such case made and provided.

Being brought before the police magistrate on the 6th March, the defendant pleaded "not guilty." He admitted that.

he had no license, and that his name did not appear in the assessment lists of the city.

Joseph O'Meara, the informant, deposed that he was a detective; he met the defendant the day before in the Russell House (an hotel in the city of Ottawa) in room 95. He had samples of ladies' dress goods in the room. He had his goods spread out on chairs and a table. They were samples of cloth a few inches square. He said he was taking orders for clothing and sending them on from Montreal when made up. He had the samples there for people to select the piece of cloth they wished to have the clothes made from. He did not say how long he was there. Cross-examined, O'Meara said that the door opened out of a bedroom and parlour in the hotel on to the corridor. The defendant said he delivered the goods in Montreal or sent them on to Ottawa to the address of the purchasers. The defendant said the ladies came and ordered the goods for their own private use, and he had a letter from a lady in Metcalfe street to come down and take her order.

Samuel St. Jacques deposed that he was a clerk in the Russell House. The defendant came to Ottawa on the 4th March, and was stopping at the Russell House. He engaged a sitting-room and a bed-room. He occupied the rooms by the day. He was a ladies' tailor in Montreal, and came up to Ottawa to do business in his trade. He hired the rooms for the purpose of doing business in his trade here. Cross-examined, St. Jacques said that the defendant rented the rooms the same as other guests. The rooms were under the control of the management of the house. They were attended to like the others in the house. The defendant rented these rooms by the day and had full control of them while he held them. He could sell goods or do any other thing which he might lawfully do in any other place.

By-law No. 1564 of the city of Ottawa provides:—

"1. No transient trader who occupies premises within the municipality of the city of Ottawa, and is not entered upon the assessment roll of the said city in respect of income or personal

property for the then current year, shall offer goods or merchandize of any description for sale by auction, or in any other manner, conducted by himself or by a licensed auctioneer, or by his agent, or otherwise, within the limits of the said city of Ottawa, without or until he shall have first duly taken out a license for that purpose.

"2. There shall be levied and collected from the applicant for every such license for a transient trader the sum of \$250.

"5. The words 'transient traders,' wherever they occur in this by-law, shall extend to and include any person commencing the said business in the said city of Ottawa who has not resided continuously in the said city for a period of at least three months next preceding the time of the commencement of such business.

"6. Any person . . . who shall be guilty of any . . . breach of this by-law . . . shall upon conviction thereof . . . forfeit and pay such fine as the police magistrate . . . convicting shall inflict, of not less than \$1, and not more than \$50, together with the costs of prosecution; and in default of payment thereof the same shall be collected by distress and sale of the goods and chattels of the offender; and in case of non-payment of the fine . . . and there being no distress . . . such offender shall be imprisoned . . . with or without hard labour, for any time in the discretion of the police magistrate . . . convicting, not exceeding six months, unless such fine and costs be sooner paid."

(See sec. 583, sub-secs. 30 and 31, of the Municipal Act. R.S.O. 1897, ch. 223.)

The police magistrate convicted the defendant on the charge preferred, and sentenced him to pay a fine of \$20 and \$2 costs, both to be levied by distress, and in default one month in gaol at hard labour.

The conviction was in terms of the information and by-law.

The conviction was removed into the High Court by *certiorari* issued on the 1st April, 1902.

By 2 Edw. VII. ch. 12, sec. 14 (O.), sec. 7 of the Ontario Summary Convictions Act was amended by adding the following sub-section thereto:—

“(2) No such conviction or order as aforesaid shall be removed into the High Court of Justice by writ of certiorari except upon the ground that an appeal to the court of general sessions of the peace as herein provided would not afford an adequate remedy.”

The Act containing this amendment was assented to on the 17th March, 1902.

A return to the *certiorari* having been made and filed, on the 10th April, 1902, before a Divisional Court (BOYD, C., FERGUSON and MEREDITH, JJ.), *E. E. A. DuVernet*, for the defendant, moved for a rule *nisi* to quash the conviction of the defendant, upon the following, amongst other, grounds:—

1. That the defendant was not upon the evidence a transient trader within the meaning of the Municipal Act.

2. That the defendant did not sell or offer for sale any goods or merchandize at the city of Ottawa.

3. That it is no offence for any one, within any municipality, whether resident within such municipality or not, to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from similar cloth and delivered to persons giving such orders.

4. That there is no sufficient evidence of the fact of offering for sale.

5. That the conviction does not shew that the defendant carried or exposed goods to be afterwards sold or delivered in the city of Ottawa to any particular person.

6. That the statute upon which the by-law is founded is intended to affect only traders who occupy premises which are separate and distinct and in respect of which the trader might be assessed, and is not intended to affect the exposing of samples in a room of an hotel occupied under the circumstances appearing in evidence.

7. That the offence was not complete in the city of Ottawa, or in the Province of Ontario.

8. That the evidence does not disclose any offence.

9. That the conviction improperly awards imprisonment for non-payment of the costs. The by-law is invalid in providing for imprisonment for costs.

10. That the conviction cannot be amended so as to cause a variance from the minute.

The rule *nisi* was granted.

TORONTO, May 14th, 1902.

DuVernet moved the rule absolute. The evidence does not disclose any offence against the transient traders' sub-sections of sec. 583. The goods were not sold nor offered for sale at Ottawa : *Rex v. McKnight* (1830), 10 B. & C. 734; *Regina v. Coutts* (1884), 5 O.R. 644; *Regina v. Applebe* (1899), 30 O.R. 623; *Regina v. Langley* (1899), 31 O.R. 295; *Regina v. Cuthbert* (1880), 45 U.C.R. 19; *Regina v. Caton* (1888), 16 O.R. 11. The by-law is bad, as it provides for imprisonment for non-payment of costs: *Regina v. McMillan*, 12th January, 1901, unreported decision of a Divisional Court (Falconbridge, C.J.K.B., and Street, J.); *Regina v. Hartley* (1890), 20 O.R. 481, 485. If the conviction is bad on this ground, it will not be amended unless the evidence warrants it.

A. B. Aylesworth, K.C., for the complainant. It is entirely a question of fact, and one proper for the decision of the magistrate, and the Court will not review his decision. The *certiorari* was issued on the 1st April, after the right to *certiorari* had been taken away by 2 Edw. VII. ch. 12, sec. 14, amending R.S.O. 1897, ch. 90, sec. 7. The *certiorari* was, therefore, improvidently issued, but it is not necessary to move to quash it. That it was improperly granted may be shewn as cause against the rule to quash: *Regina v. McAllan* (1880), 45 U.C.R. 402. But, if the conviction can be reviewed, the evidence shews an offence against the statute and by-law. There was an occupation of premises, if that is necessary:

Regina v. Roche (1900), 4 Can. Cr. Cas. 64, 32 O.R. 20. That is a question which could be threshed out on an appeal to the sessions. In *Regina v. Cuthbert*, 45 U.C.R. 19, occupation of premises was held to be necessary, but it is not necessary that they should be taxable premises. Here there was an exclusive occupation while it lasted. An offering for sale is all that is necessary under the statute, and that is abundantly shewn.

Du Vernet, in reply. *Certiorari* is not taken away where the magistrate has no jurisdiction, and if the statute does not make what the defendant did an offence, the magistrate has no jurisdiction: *Regina v. Playter* (1901), 4 Can. Cr. Cas. 338, 1 O.L.R. 360; Paley on Convictions, 7th ed., pp. 350, 351; *Hespeler v. Shaw* (1858), 16 U.C.R. 104, 105, 106; *Regina v. Toronto Public School Board* (1900), 31 O.R. 457; *Rex v. Dungey* (1901), 5 Can. Cr. Cas. 38, 2 O.L.R. 223. What the defendant did is just what any commercial traveller does, and does not amount to a sale or an offering for sale: *Pletts v. Campbell*, [1895] 2 Q.B. 229.

TORONTO, May 15, 1902.

BOYD, C.:—The Municipal Act, R.S.O. 1897, ch. 223, under Division XVIII.—Regulation of Trade—provides that by-laws may be passed for licensing hawkers or persons carrying on petty trades, or who go from place to place . . . carrying goods . . . for sale: sec. 583 (14.) “*Hawkers*” shall include all persons who . . . sell or offer for sale tea, dry goods, etc., etc., or carry and expose samples or patterns of any of such goods to be afterwards delivered: *ib.*, sub-sec. (a).

For licensing transient traders who occupy premises for temporary periods . . . who may offer goods or merchandise for sale by auction, or in any other manner, conducted by themselves or by a licensed auctioneer or otherwise: sec. 583 (30, 31).

The words common to both classes of dealers are “offer goods for sale.” As to pedlars, that has been held not to include the carrying of samples of goods and making sales of bulk goods to be delivered in accordance with the sample. To

remedy this omission, amendments were made by the introduction of the words descriptive of what was meant by the term "hawker," so that it is to include those who carry or expose samples or patterns of goods to be delivered afterwards. It would require equivalent amending legislation, in my opinion, to bring the defendant under the category of "transient traders."

In the case in hand no goods are offered for sale; samples of goods are exhibited suitable for clothing, and the transaction is carried out by the choice of some particular pattern in Ottawa, notification of which is sent to Montreal, whereupon the garment is made, out of that material, and forwarded to the person giving the order at Ottawa, who then makes payment on delivery.

The collocation of the words in the statute as to sale or offering for sale by transient traders, implies some exhibition and visible presentation of the goods dealt in, such as occurs in sales by auction; the whole trading being carried on by the occupant of fixed premises within the municipality.

Neither in terms nor in substance was there, according to judicial exposition, an offering of goods for sale within the municipality. Nevertheless, the effect of this method of dealing may be to affect prejudicially the business of tax-paying tailors and clothiers of Ottawa.

According to the cases, *certiorari* lies if the magistrate has no jurisdiction over the matter adjudicated. That is, there was no power to pass a by-law or to convict under the transient traders' clauses in the Municipal Act in respect to a person living at an hotel and taking orders for clothing to be made out of material corresponding with samples exhibited.

The conviction is thus *ultra vires*, and should be quashed without costs.

MEREDITH, C.J.:—I agree; and on the second point I think we are bound by the authorities to hold that *certiorari* lies.

Conviction quashed.

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE WALKEM, IRVING AND MARTIN, JJ., SITTING AS A COURT OF
CRIMINAL APPEAL.

THE KING v. BROOKS.

Neglect to provide necessities to child—Medical attendance and remedies as “necessaries”—Objection on religious grounds to medical treatment—Sect of Zionites—Construction of statute—Part headings of Code as aid to interpretation—Respite of sentence on “speedy trial” pending reserved case—Enforcement in case of inability of trial judge through absence from province—Code secs. 209, 210, 746, 770.

1. Medical attendance and remedies are necessities within the meaning of sections 209 and 210 of the Criminal Code and any one legally liable to provide such is criminally responsible for neglect to do so, as well under the common law as under the Code.
2. Conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse.
3. The Part headings of the Criminal Code have the same effect as preambles to statutes, and the heading “Duties tending to the preservation of life” prefixed to Part XVI. is to be regarded in the construction of the Code sections contained in that Part.
4. The terms “necessaries of life” and “necessaries” in sections 209 and 210 mean such necessities as tend to preserve life.
5. Where the conviction and sentence of a prisoner tried under the Speedy trials Part (LIV.) is respited pending the hearing of an appeal by way of case reserved, and the conviction is affirmed on the appeal, another judge may, in the absence of the trial judge from the province, give effect to the respited judgment by virtue of section 770.

ARGUED : January 11, 1902.

DECIDED : January 11, 1902.

The following case was reserved by DRAKE, J., the trial Judge.

In this case the prisoner was tried before me upon the following indictment;

In the County Court Judge's Criminal Court. Canada, Province of British Columbia, County of Victoria, City of Victoria, To wit,

Eugene Brooks stands charged for that he the said Eugene Brooks at the City of Victoria, in the County of Victoria, in the Province of British Columbia on the fourth day of Septem-

ber in the year of our Lord one thousand nine hundred and one, unlawfully did kill and slay one Victoria Helen Rogers.

(2.) And the said Eugene Brooks stands further charged that one John Rogers on the day and year and at the place last mentioned and on divers other days before said last mentioned day being in charge of another person, to wit, the said Victoria Helen Rogers, she the said Victoria Helen Rogers being then unable by reason of her age and sickness to withdraw herself from the charge of the said John Rogers, and the said Victoria Helen Rogers being then unable to provide herself with the necessaries of life, and the said John Rogers being then and there under a legal duty to provide the said Victoria Helen Rogers with the necessaries of life, the said Eugene Brooks on the day and year and at the place last aforesaid and on divers days before the said last mentioned day was present unlawfully aiding, abetting, assisting, counselling and procuring the said John Rogers not to regard his above mentioned duty whereupon the said John Rogers unlawfully did refuse, omit and neglect, without lawful excuse to provide the said Victoria Helen Rogers with the necessaries of life, which said refusal, omission and neglect then and there caused the death of the said Victoria Helen Rogers.

(3.) And the said Eugene Brooks stands further charged that the said John Rogers being the father of the said Victoria Helen Rogers, who was on the day and year and at the place last mentioned a member of the household of her said father, and the said Victoria Helen Rogers being then under the age of six years and the said John Rogers being then under a legal duty to provide the said Victoria Helen Rogers with necessaries, the said Eugene Brooks on the day and year and at the place last aforesaid and on divers days before said last mentioned day was present unlawfully aiding, abetting, assisting, counselling and procuring the said John Rogers not to regard his above mentioned duty, whereupon the said John Rogers unlawfully did refuse, omit and neglect without lawful excuse to provide the said Victoria Helen Rogers with necessaries, which said refusal,

omission and neglect then and there caused the death of the said Victoria Helen Rogers.

(4.) And the said Eugene Brooks stands further charged that the said John Rogers being the father of the said Victoria Helen Rogers who was on the day and year and at the place last mentioned a member of the household of her said father and the said Victoria Helen Rogers being then under the age of six years and being unable to provide herself with the necessaries of life and the said John Rogers being then under a legal duty at common law to provide the said Victoria Helen Rogers with the necessaries of life, the said Eugene Brooks on the day and year and at the place last aforesaid and on divers days before said last mentioned day was present unlawfully aiding, abetting, assisting, counselling and procuring the said John Rogers not to regard his above mentioned duty, whereupon the said John Rogers unlawfully did refuse, omit and neglect without lawful excuse to provide the said Victoria Helen Rogers with the necessaries of life, which said refusal, omission and neglect then and there caused the death of the said Victoria Helen Rogers.

(5.) Same as 1, except read 5th September instead of 4th September, and Cecil Alexander Rogers instead of Victoria Helen Rogers.

(6.) Same as 2, except as to alterations mentioned in 5.

(7.) Same as 3, except as to alterations mentioned in 5.

(8.) Same as 4, except as to alterations mentioned in 5.

The prisoner was found guilty on counts 2, 3, 4, 6, 7, 8, and not on the charges of manslaughter.

The evidence disclosed that John Rogers mentioned in said indictment was at the time of the death of his said children a member of the sect called Catholic Christians in Zion, or shortly Zionites. One of the tenets of said sect is that it is contrary to the teachings of the Bible and therefore wrong to have recourse to medical aid and drugs in case of sickness. In consequence of his belief in said doctrine Rogers omitted to provide his said children with medical attendance and appropriate medi-

cal remedies when they were sick with diphtheria. The children were both under the age of six years, were members of their father's household and were wholly dependent upon him for support. He knew the children had diphtheria and that it was a dangerous and contagious disease. The disease proved fatal to both children. Rogers' circumstances were such that he could have paid for medical attendance and medical remedies. The medical testimony proved conclusively the nature of the disease that caused the death of these children, and that the ordinary remedies would have prolonged their lives, and in all probability would have resulted in their complete recovery. Under these circumstances I held that the father had omitted without lawful excuse to perform the duty in the premises imposed upon him by sections 209 and 210 of the Criminal Code and by the common law and I held upon the evidence that the prisoner Eugene Brooks was present unlawfully aiding, abetting, assisting, counselling and procuring Rogers to omit without lawful excuse to perform his said duties.

The prisoner Brooks was convicted and sentenced to three months' imprisonment. I respited the execution of said sentence, admitted Brooks to bail and at his request reserved the following questions for the Court of Crown Cases Reserved :

(1.) Does section 209 of the Criminal Code impose upon a person, who has charge of any other person unable by reason of sickness to withdraw himself from such charge and unable to provide himself with the necessaries of life, the legal duty of providing such other person with reasonable medical attendance and appropriate medical remedies when the person having charge of the other person is financially able to provide such attendance and remedies ; and if the death of such person is caused, or if his life is endangered by the first-mentioned person's omission without lawful excuse to perform said duty is the said first mentioned person criminally responsible for such omission ?

(2.) Does section 210 of the Criminal Code impose upon a parent in case of sickness of his child a legal duty to provide reasonable medical attendance and appropriate medical remedies

for such child, such child being under the age of sixteen years and being a member of his parent's household, and the parent being financially able to provide such attendance and remedies; and if the death of such child is caused, or if his life is endangered by the parent's omission without lawful excuse to perform said duty, is the parent criminally responsible for such omission?

(3.) Does the common law of England in a case similar to that stated in question number 1. impose upon the person having charge of the other person a legal duty to provide such other person with reasonable medical attendance and appropriate medical remedies, and is the person who omits without lawful excuse to perform such duty criminally responsible for such omission?

(4.) Does the common law in England in a case similar to that stated in question number 2, impose upon a parent the legal duty of providing reasonable medical attendance and appropriate medical remedies for his child and is such parent criminally responsible for omitting without lawful excuse to perform such duty?

(5.) Is the conscientious belief that it is contrary to the teachings of the Bible and therefore wrong in case of sickness to have recourse to medical attendance and appropriate medical remedies a lawful excuse for omitting to perform the above mentioned duties?

Should the Court be of opinion that none of said duties is a legal duty entailing criminal responsibility, or should the Court be of opinion that the belief mentioned in question 5 is a legal excuse for omitting to perform said duties then the said conviction should be quashed.

VICTORIA, B.C., January 11, 1902.

The reserved case was argued before WALKEM, IRVING and MARTIN, JJ.

Maclean, D. A.-G., for the Crown.

No one for the prisoner.

The Court answered questions numbered 1, 2, 3 and 4 in the affirmative and question 5 in the negative ; affirmed the conviction and ordered and directed that the sentence imposed should be carried into execution.

Subsequently the following opinion was filed by

WALKER, J. : In affirming the conviction of the defendant, we have been guided by the judgment of the Court in *Reg. v. Senior* (1899), 68 L.J.Q.B. 175. In that case, the prisoner was charged with the manslaughter of his infant child, of which he had the custody. He was one of a sect that objected on religious grounds to medical aid and to the use of medicine in cases of disease, and he, therefore, purposely abstained from using either of those remedies for the benefit of his child, though he knew that it was suffering from pneumonia and was dangerously ill. It was proved that medical aid would have prolonged, and probably saved the child's life, and, furthermore, that the prisoner had sufficient means to procure it. Under the circumstances, it was held that he had wilfully neglected the child in a manner likely to cause injury to its health within the meaning of section 1 of the Imperial Act, 57-58 Vict., ch. 41, which enacts that "If any person over the age of 16 years, who has the custody, charge, or care of any child under the age of 16 years, wilfully . . . neglects . . . such child . . . in a manner likely to cause . . . unnecessary suffering, or injury to its health, . . . that person shall be guilty of a misdemeanour."

It will thus be seen that there is no appreciable difference between the facts which led to the prisoner's conviction and those stated in the case reserved ; and, hence, one may safely conclude that had the above section been in force here, the present defendant's conviction would have been inevitable and also unassailable. Such being the case, we have only to see whether the conviction he complains of was warranted either by the common law or by sections 209 and 210 of the Criminal Code. *Reg. v. Instan*

(1893), 17 Cox C.C. 602, would seem to warrant his conviction under the common law.

Sections 209 and 210 are set out, almost verbatim, in the second and third paragraphs in the case reserved. They appear in the Code under the heading of "Duties Tending to the Preservation of Life." As such headings have the same effect as preambles to statutes, the terms "necessaries of life," and "necessaries," which occur in the respective sections, mean, when read in connection with the heading mentioned, such necessaries as tend to preserve life, and not necessaries in their ordinary legal sense. With respect to the functions of prefixes to sections and headings of sections, or groups of sections, see *Hammersmith Railway Co. v. Brand* (1869) L.R. 4 H.L. 171; *Bryan v. Child* (1850), 5 Ex. 368; *Eastern Counties, etc., Companies v. Marriage* (1860), 9 H.L. Cas. 32. This seems to me to dispose of the whole question, for the learned Judge states that the medical evidence "conclusively proved" that medical aid and remedies were necessaries that might have saved the children's lives.

The fact that the defendant was prosecuted as an accessory before the fact is unimportant, as he might have been prosecuted as a principal by virtue of section 61 of the Code.

Although not so stated in the case reserved, Rogers, the parent of the children, has already been convicted as a principal on similar charges to those preferred against the defendant.

As a matter of practice, the above certificate has been directed in accordance with section 746 of the Code "to the proper officer" of the Speedy Trials Court, in order that the learned trial Judge may give effect to his judgment; but as he is absent from the Province any Judge of this Court may act in his stead, as provided by section 770 of the Code. The conviction, as I have already said, is affirmed.

Conviction affirmed.

Note: *Manslaughter—Parents' neglect to supply medical aid to child.*

The leading English case on this subject is *R. v. Senior* [1899], 1 Q.B. 283, 68 L.J.Q.B. 175, referred to in the above judgment. It was there held that a person who has the necessary means to procure medical aid for a child in his care or charge, who is, to the knowledge of such per-

Note:—Continued.

son, in a dangerous state of health, and for whom medical aid and medicine are such essential things that reasonably careful persons would have provided them for children in their care, is bound to do so. It is no excuse that the accused believed that to call in medical aid would be wrong as being contrary to the teachings of the Bible or as shewing want of faith in the Deity. If the death of the child was caused or accelerated by the neglect, the accused is guilty of manslaughter. *R. v. Senior* [1899], 1 Q.B. 283; *R. v. Instan* [1893], 1 Q. B. 450, 17 Cox C.C. 602; Code sec. 224. There must, however, be positive evidence that the death was caused or accelerated by the neglect to provide medical aid. *R. v. Morby* (1881), 8 Q.B.D. 571. In the last mentioned case the prisoner had been convicted of the manslaughter of his son, a child of tender years. The child died of small-pox, and the prisoner though able to do so did not supply medical aid, owing to his being one of the Peculiar People, a sect which holds religious objections to so doing, the members believing that diseases are to be cured by prayer and anointing with oil. It was proved that proper medical aid might possibly have saved or prolonged the child's life, and would have increased its chance of recovery, but that it might have been of no avail, and there was no positive evidence that the death was caused or accelerated by the neglect to provide medical aid. It was held that under the circumstances the conviction could not be sustained. *R. v. Morby* (1881), 8 Q.B.D. 571, 51 L.J.M.C. 85.

A presumption that the prisoner was, at the time of the neglect which caused or accelerated the death, possessed of sufficient means to have provided food and medicine is raised by proof of possession by her of such means at a certain date prior to the date of the neglect as, having regard to the circumstances, would presumably not be exhausted at the date of the neglect, and affords evidence to go to the jury of actual possession of means at the date of such neglect. *Rex v. Ellen Jones* (1901), 19 Cox C.C. 678, per Kennedy, J., at Worcestershire Assizes.

[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE TAYLOR, C.J., DUBUC AND KILLAM, JJ.

THE QUEEN v. ZICKRICK.

Certiorari—Failure to serve magistrate's summons—Return of information to justice after conviction quashed—Second summons—Prohibition against—Procedendo—Cr. Code 895.

1. Where a summary conviction has been removed by certiorari, together with the information and proceedings thereon, and the conviction is thereupon quashed, the information becomes part of the record in the Court above and cannot be returned to the magistrate for the purpose of a second summons thereon, although the ground for quashing the conviction was that the defendant had not been served, and had not authorized an appearance for her.
2. An order for the return of any of the proceedings to the convicting justice is only authorized under Cr. Code sec. 895 in cases where formerly a procedendo would have issued upon the conviction being affirmed, and not where the conviction is quashed.
3. Prohibition will be granted against a justice to prevent his proceeding under a second summons after the quashing of a conviction for want of service of the first summons or of appearance thereunder.
4. *Semble*, per KILLAM, J., the justices in proceeding with the second summons were guilty of contempt of Court, notwithstanding that the information had been returned to them under a Judge's order.

ARGUED: February 1, 1897.

DECIDED: February 27, 1897.

Application for prohibition. Minnie Zickrick was summoned to appear on the 4th of June, 1896, before two Justices, having been charged, by an information laid on the 1st of June, with an offence under The Liquor License Act. On the return of the summons, a solicitor appearing and pleading guilty on her behalf, she was convicted and a fine was imposed.

Thereafter, steps being taken to enforce payment of the fine, she obtained a writ of certiorari, and a return of the record having been made, she applied to quash the conviction, alleging that she had never been served with the summons, and had never instructed anyone to appear for her before the justices. On the 28th of October an order was made by Bain, J., quashing the conviction. On the 31st of October she was served

with another summons dated the 1st of June, reciting a complaint which charged her with an offence identical in terms with that for which she was convicted on the 4th of June, and requiring her to appear and answer on the 4th of November. A motion for a prohibition was then made and argued before Bain, J., who discharged the rule with costs. The defendant appealed to the Full Court to have the order then made reversed upon, amongst others, the following grounds: (1) The information upon which the complainant and justice of the peace were assuming to proceed had already been adjudicated upon, and a conviction made thereon. (2) That by the quashing of the conviction the information upon which the same was based was also quashed, and further proceedings could not be taken thereon.

WINNIPEG, February 1, 1897.

F. C. Wade for appellant: On quashing a conviction the information is quashed also. As to meaning of "conviction," see *Brown's Law Dictionary* and *Bouvier's Law Dictionary*. Applicant contends the whole record was quashed, including the information. Under The Liquor License Act. R.S.M. ch. 90, sec. 174, an information must be laid within thirty days after the commission of the offence. The information in this case was laid in June, 1896, but the summons now being proceeded on by the justices was issued in November following. The information is now spent: *Reg. v. Thomas*, 8 L.T.N.S. 460; *Reg. v. Herrington*, 12 W.R. 420. The information was part of the record on the first application, it was not sent back in any regular way: *Paley on Convictions*, 381. It was not properly in the hands of the justices, and, therefore, they could not proceed on it by issuing a second summons.

H. A. Maclean for the justices: There was an order made by Bain, J., returning the information to the justices. There is no provision in the Liquor License Act as to when the hearing of a complaint shall take place.

WINNIPEG, February 27, 1897.

TAYLOR, C.J. :—How the information in this case returned with the writ of certiorari got back to the justices, so that they are proceeding under it a second time, does not appear from any of the affidavits or proceedings filed on the application now before the Court. Counsel for the defendant urged that this information forming part of the record returned under the certiorari is not now in the hands of the justices in a regular way and so they cannot proceed upon it. There may be a question whether this argument can be raised properly under either of the two grounds of appeal. But no exception was taken to it by the counsel for the Crown, and he sought to answer it by stating that after the conviction was quashed, Mr. Justice Bain was applied to for the return of the information to the justices, and he so ordered. For this proceeding sec. 895 of the Criminal Code, 1892, was relied on. But that section merely provides that, where a motion or rule to quash a conviction is discharged or refused, in order to send back the record it shall not be necessary to issue a writ of procedendo, that is, where, before that section a procedendo would have issued to send back a record, it may now be sent back without issuing the writ. The section in no way provides for sending back a record where formerly a procedendo would not have been granted.

On a certiorari the information or complaint should be returned with the conviction: Paley on Convictions, 370. When a conviction is affirmed, process for recovery of the penalty must issue out of the Court above, for, the record being there, the justices below have no further authority: Paley on Convictions, 381; *The Queen v. Justices of Hampshire*, 33 L.J.M.C. 104. As a general rule, if a record was filed in the superior Court upon a certiorari it could not be sent back or removed: 2 Hawk. P.C., ch. 27, sec. 63.

In what cases then was a procedendo granted? Apparently it was so in two cases only. In Bouvier's Law Dictionary and

Brown's Law Dictionary, it is said to be a writ by which a cause removed from an inferior to a superior Court by certiorari or otherwise, is sent down again to the same Court to be proceeded with there after it has appeared that the defendant had not good cause for removing it. That was one case. The other was, where it appears from the return that the Court above could not administer the same justice to the parties as the Court below, and there would be a failure of justice if the record were not sent back : Tidd's Prac., 413 ; Paley on Convictions, 382. *Palmer v. Forsyth*, 4 B. & C. 401, was an action in the Court of Pleas at Berwick, in which the defendant had been arrested upon a *capias* and had given bail, after which a writ of *habeas corpus* was obtained and a certiorari to which copies of the record were returned. Cause was shewn to two rules, the one to quash the *habeas corpus*, the other to quash the certiorari and return, and for a *procedendo*. Counsel argued that there could be no *procedendo* for the record had not been returned into the King's Bench. The Court holding that the *habeas corpus* must be quashed, next dealt with the certiorari and held that it must be quashed also, a copy of the record having been returned instead of the record itself. The judgment then proceeded : "It is said that a *procedendo* cannot be awarded, because a record once removed cannot be sent back, but the record has not been removed, both rules must therefore be made absolute." See also *Reg. v. Cartworth*, 8 Jur. 360.

In *King v. Kenworthy*, 1 B. & C. 711, the defendant was found guilty of perjury and the record was removed into the King's Bench by writ of error, which it was argued had been issued too soon and must be quashed. An order for transportation had been made, but it had not been followed up by a judgment. The Court could not pronounce the judgment, because the statute under which the defendant was convicted required it to be pronounced by the Court before which the party was tried, and it was held that, as no judgment had been entered below, and the King's Bench had no power to supply the deficiency, the proper course was to order the Court below to

proceed to give judgment on the conviction, and a procedendo was awarded.

The King v. Neville, 2 B. & Ad. 299, was a case of a conviction under which a penalty had been imposed. The statute under which the conviction was made provided that the penalty should be levied by distress and sale, and gave the justices authority, for want of a sufficient distress, to commit the offender to prison for any term not exceeding six months. The conviction removed under a certiorari having been affirmed, a levamur facias was issued, to which there was a return of nulla bona. A rule nisi was then obtained for a ca. sa. or a procedendo to carry back the record and commanding the justices to award execution against the defendant thereon, and the rule was made absolute for a procedendo. Tenterden, C.J., said: "I think we ought to make the rule absolute for a procedendo. It is undoubtedly a general rule, that if a record be filed in this Court upon a certiorari it cannot be sent back or remanded; but the rule applies to cases where this Court has the power to execute the judgment of the inferior Court. Here we have not the power (which the convicting justices have), in case there be not a sufficient distress, of exercising a discretion as to the term of imprisonment; so that, in the event that has happened, this Court cannot enforce the execution of the judgment. In order to prevent a failure of justice, therefore, I think we ought to send the record back to the sessions, in order that that Court may cause it to be enforced, as they would have done if it had never been removed." Littledale, J., said: "It is a technical rule, undoubtedly, that if a record removed by certiorari be once filed in this Court, it shall not be sent back; but that rule is not inflexible." Then, after referring to *King v. Kenworthy*, he added, "On the same principle the Court ought, in this case, to grant a procedendo to enable the justices below to award execution; for there will be a failure of justice if the record be not sent back to the sessions." Taunton and Patteson, JJ., both agreed that, the Court not possessing the authority which the convicting justices did, to prevent a failure of justice the record should be sent back.

So in *Reg. v. Rushworth*, 9 Jur. 161, a *levari facias* having been returned *nulla bona*, the court granted a *procedendo* to carry back the record of conviction, commanding the justices to proceed to enforce execution.

The present case does not fall within the first class of cases, that the defendant had not good cause for removing the record, for she succeeded in quashing the conviction. It cannot fall within the second, for the conviction having been quashed there can be no execution to be awarded upon it by the justices. I can find no case in which, the conviction having been quashed, the record was sent back. In my opinion the information is not now properly before the justices, and they have no jurisdiction to act upon it.

The appeal should be allowed, the order moved against set aside, and a prohibition granted.

DUBUC, J.:—It is contended on behalf of the defendant that the information is part of the conviction, and that the order quashing the conviction had also quashed the information, and that, therefore, the same information could not be used again as the basis of new proceedings.

That contention appears to be supported by Brown's New Law Dictionary, where a conviction is defined to be a record of the summary proceedings upon a penal statute, before one or more justices of the peace, in a case where the offender has been convicted and sentenced, and consists, (1), of an information or charge against the defendant; (2), of a summons or notice of such information, etc.

The same definition is found in Bouvier's Law Dictionary, but he qualifies it as follows: after stating that a conviction is a condemnation, he adds: "In its most extensive sense, the word signifies the giving judgment against a defendant whether criminal or civil. In a more limited sense it means the judgment given against the criminal, and in its more restricted sense, it is a record of the summary proceedings upon a penal statute before one or more justices of the peace."

In the Criminal Code, the word conviction is used sometimes in its more restricted, and sometimes in its more extensive sense. For instance, in sec. 889, the following is found: "And any statement which, under this Act or otherwise, would be sufficient if contained in a conviction shall also be sufficient if contained in an information, summons, order or warrant."

Paley on Convictions, 5th ed., p. 76, mentions the time, before the statute 11 & 12 Vict., ch. 43, when the information as well as the evidence was recited in the conviction. The above shews that, in many instances, the word "conviction" does not mean the several proceedings, including the information, taken in a prosecution under a penal statute; but applies particularly to the giving of the judgment. As stated by Tindal, C.J., in *Burgess v. Boetefeur*, 13 L.J.M.C. 126, in common parlance the word "conviction" is taken to mean the verdict at the time of the trial, but in strict legal sense it is used to denote the judgment of the Court.

In the present case, I am of opinion, against the contention of the defendant, that the order quashing the conviction had not the effect of quashing also the information forming the foundation of the prosecution.

But then another question is raised. If the information was not quashed, could it not be sent back to the justice of the peace before whom it had been laid, and be used by him to issue a new summons calling upon the defendant to appear before him, and to proceed to hear and adjudicate upon the case as if no former trial or conviction had taken place? It seems that, for the reasons given and under the authorities cited by the learned Chief Justice in his judgment which has just been read, this could not have been done.

It was stated by the Court in *Palmer v. Forsyth*, 4 B. & C. 401, and by Lord Tenterden, C.J., and Littledale, J., in *The King v. Neville*, 2 B. & Ad. 299, that, as a general rule, when a record has been removed and filed in a superior Court, it cannot be sent back to the inferior Court.

In the first of these cases, a copy only instead of the original record had been removed, and the writ of certiorari and the return made thereunder were quashed and a procedendo awarded. In *The King v. Neville*, the conviction was affirmed, and, in order to prevent a failure of justice, the record was sent back and a procedendo granted, so that the justices of the peace might enforce the execution of the judgment, which, owing to the term of imprisonment in default of sufficient distress being left to the discretion of the convicting justices, the Court had no power to enforce.

Here, the conviction was quashed, and there seems to be no authority in such a case to warrant the sending back of the information, or of any other part of the record, to the convicting justice. It being so, the consequence is that no new summons could be issued on the information, and the writ of prohibition should have been granted.

I think the appeal should be allowed.

KILLAM, J.:—The information and conviction having been removed into this Court by certiorari, the jurisdiction of the justices was ousted.

The general rule is that when a record of an inferior Court is brought into a superior Court by certiorari and filed, it cannot be sent back. See *Fazacharly v. Baldo*, 1 Salk. 352, 6 Mod. 177; *Rex v. The Inhabitants of Clace*, 4 Burr. 2456; *Anon*, 1 Salk. 145. But, as was said by Littledale, J., in *Rex v. Neville*, 2 B. & Ad. 299, this rule is not inflexible.

However, the method of restoring the jurisdiction of the inferior Court is by a writ of procedendo. The 895th section of the Criminal Code dispenses with this writ when the conviction is confirmed, but not otherwise. Here the conviction was quashed, and it is admitted that no writ of procedendo was issued, but only a Judge's order authorizing the taking of the document containing the information off the files of the Court. If the writ had been issued under order of the Court, it does not seem to me that it could be disregarded upon the present

application as issued in a case in which, according to common practice, it ought not to have issued, and I, therefore, express no opinion as to whether it should have been issued.

As it appears so clearly that, under the circumstances, the justices have no jurisdiction, but are really (though, doubtless, in ignorance of the fact) proceeding in contempt of this Court, I agree that we may properly restrain them now, although the point was not taken originally.

*Appeal allowed and prohibition
granted, without costs.*

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE WALKEM, J.

THE KING v. BEAMISH.

*Summary conviction—Appeal—Subsequent habeas corpus proceedings—Crim.
Code secs. 523, 881.*

The decision of the Court of General Sessions or County Court in appeal from a summary conviction is final and conclusive, and a superior court has no jurisdiction to interfere by habeas corpus.

DECIDED: October 12, 1901.

Application for a writ of habeas corpus argued at Rossland on 12th October, 1901, before WALKEM, J.

Gillan, for the application.

Daly, K.C., contra.

ROSSLAND, October 12, 1901.

WALKEM, J.:—In this case the prisoner was convicted by the police magistrate of Rossland on the 19th day of August last, and sentenced to two months' imprisonment with hard labour, inasmuch as he "wrongfully and without lawful

authority, with a view to compel Joseph Horn, the informant, to abstain from proceeding peacefully through the streets of the city of Rossland aforesaid, did persistently follow the said Joseph Horn about from place to place, and with one or more other persons did follow the said Joseph Horn in a disorderly manner on Washington Street and Columbia Avenue, in said city, contrary to the provisions of the statute in such case made and provided."

By section 523 of the Criminal Code, which is the section under which the complaint was lodged against the prisoner, "Every one is guilty of an indictable offence and liable, on indictment or on summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars or to three months' imprisonment with or without hard labour, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain—

(c) Persistently follows such other person about from place to place; or

(e) With one or more other persons follows such other person in a disorderly manner in or through any street or road."

The prisoner's counsel lately applied to me for a writ of habeas corpus for the purpose of having the proceedings in the case reviewed. On inspection of the conviction I granted the rule nisi, which is now up for argument—Mr. Daly appearing as counsel for the Crown.

I have now been informed for the first time that immediately after the conviction the prisoner's counsel gave notice of appeal to the County Court of Kootenay, and that the case was re-tried by His Honour Judge Leamy, and the sentence of the police magistrate confirmed.

Under these circumstances, it appears to me that I have no jurisdiction to deal with the case or express any opinion upon it, for by sec. 881 of the Code—"When an appeal against any

summary conviction or decision has been lodged in due form . . . the Court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or decision."

Notwithstanding the ungrammatical structure of this section, it is clear that the Legislature intended that absolute effect should be given to the appellate Judge's decision, both on questions of law and fact, in respect to the magistrate's conviction or decision, or, in other words, that the decision of the appellate Judge should be regarded as final and conclusive.

Moreover, the final judgment in the present case being that of a Judge of the County Court, it is the judgment of a "Court of Record" (County Courts Act, R.S.B.C. 1897, ch. 52, sec. 4), and also in view of the language of section 881, which I have just been considering, of a Court of competent jurisdiction; consequently, the validity of the judgment cannot be impeached by habeas corpus proceedings. There are numerous authorities to this effect—the well-known case of *In re Robert Evan Sproule* (1886), 12 Can. S.C.R. 140, being one of them.

Apart from this, the defendant had the right, immediately after his conviction, to elect any one of three remedies which were open to him; that is to say, either to proceed, as he is now doing, by way of habeas corpus; or to procure a case stated and have it heard (see section 900 of the Code); or to appeal under other provisions of the Code to the County Court of Kootenay.

Having elected to take this last course, he is bound by the result of it. *R. v. Arscott* (1885), 9 Ont. R. 541, has been cited by the prisoner's counsel as shewing that, notwithstanding the fact of the appeal from a magistrate having been heard and determined, the whole proceedings in the case could be reviewed; but that case is clearly inapplicable here, as it was a decision given in 1885, and hence about seven years before section 881 became law.

I need hardly say that, had it not been for the intervention of the appeal to the County Court, I would have had jurisdic-

tion to entertain the application now made; but, as it is, the rule must be discharged with costs.

Habeas corpus refused.

Note: *Finality of a judgment on appeal from summary conviction.—Cr. Code, sec. 881.*

Sec. 881 provides that the court appealed to shall be the *absolute* judge as well of the facts as of the law in respect to the conviction appealed from. Such provision has been held to be *intra vires* of the Dominion Parliament. *R. v. Malloy* (1900), 4 Can. Cr. Cas. 116 (Ont.). The section gives the court power to deal with and consider the law as it affects the whole conviction, as well the validity of the conviction as the admissibility of testimony, and whether the evidence proves the offence charged. *R. v. Tebo* (1889), 1 Terr. L.R. 196. The court to which the appeal is taken may quash the conviction for defects or errors apparent on its face. *Ibid.*

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC]

DISTRICT OF MONTREAL.

BEFORE ARCHIBALD, J.

MAYER v. VAUGHAN.

Post letter—Theft of detention of, by letter carrier—Decoy letter to fictitious address—Failure of carrier to report under post office regulations—Arrest and search—Reasonable and probable cause—Post Office Act, R.S.C., 1886, ch. 35—Cr. Code secs. 4, 326.

1. A decoy letter, duly stamped and placed by post office officials amongst the letters at a post office for the purpose of testing the honesty of the letter carrier whose duty it was to deal with the same, is none the less a "post-letter" because of its being directed to a fictitious address.
2. If the carrier should fail to report the letter as required by the post office regulations or to return it within a reasonable time to his superior officer, he would be guilty of unlawfully detaining the letter under sec. 89 of the Post Office Act (R.S.C., 1886, ch. 35).
3. Where a police officer, acting under the instructions of the post office department in investigating the alleged theft of letters by letter carriers, believed that the carrier had stolen the letter and detained and searched him, an action for false arrest will not lie in the absence of malice.

MONTREAL, December 28, 1901.

ARCHIBALD, J. :—This is an action to recover damages for false arrest.

Plaintiff was a letter carrier in the employ of the post office department, and was attached to the post office division bearing the number 48, in the city of Montreal, having its headquarters at the corner of St. Lawrence and Ontario streets.

It was the duty of plaintiff to make four deliveries in certain streets, which the plaintiff mentions, per day, namely, one early in the morning, about eight o'clock; the second about eleven o'clock; the third about two o'clock, and the fourth about four o'clock.

On Saturday, 5th January, 1901, plaintiff was in the act of going through his third route. When he had reached the upper part of St. Denis street, about the corner of Pine avenue, he was seized by defendant, who declared that he was one of the

city detectives, and that he was putting him (plaintiff) under arrest, and defendant thereupon shewed plaintiff a badge which he was carrying as token of his authority. Defendant told him that he was arresting him because he had stolen a money letter bearing the address of one Caroline Dugré, 35 Laval avenue, which letter he alleged contained two American ten dollar bills.

Plaintiff then alleges that he then told defendant there was no such number as 35 Laval avenue, and that he was innocent of the charge, and that defendant was mistaken, but in spite of plaintiff's protests defendant conducted him as a prisoner to a house on St. Denis street, holding him like a criminal by the collar in the crowded streets, and, after entering said house, plaintiff was ordered to undress himself, and thereupon searched, and his clothes were searched by the defendant, but no letter was found on his person nor in his letter bag, nor in his clothing, whereupon defendant released him and ordered him to proceed with the distribution of his letters; that defendant several times reiterated in the presence of the superior officer of plaintiff and several other persons, his charge against the plaintiff, and that he had stolen the letter in question.

Plaintiff then alleges that on the 7th of January, 1901, the letter described by the defendant was found at the headquarters of division No. 48, bearing post marks which indicated that the letter in question had been posted in the afternoon of Sunday, the 6th of January.

Plaintiff then proceeds to allege the description of a plan by which the defendant and others had undertaken to entrap him by mailing money letters which would fall into his hands, and by watching what would become thereof; that as a consequence of defendant's action, plaintiff lost the confidence of his employers and was dismissed from the service; that defendant's action was false and calumnious and without cause, and plaintiff prays for a judgment of \$5,000.

This case was originally adjudged *ex parte*, and a judgment of \$1,000 was rendered against the defendant.

An opposition to judgment was afterwards, by consent of the Court, produced, and the case now comes before me on the merits.

Defendant sets up that he was a peace officer, and states the reasons why a plea was not filed within the delays, and then proceeds to deny the essential allegations of the plaintiff's declaration, and then proceeds to allege that complaints having been made of the loss of many money letters in said district No. 48, in which plaintiff was letter carrier, the post office department, in order to discover whether plaintiff was honest in the discharge of his duty as letter carrier, placed in the bag of letters given to the plaintiff for delivery, two decoy letters on the morning of the 5th January, 1901, one of which letters was addressed to Caroline Dugré, 35 Laval avenue (which was a fictitious address), and the other was addressed to a real person and a real address.

Defendant alleges that it was the duty of the plaintiff, after receiving his bag for delivery, to sort the letters before proceeding to deliver the same, and that he was bound, under the regulations of the post office (well known to him), to enter the said letter in his book and then return the same to the head of the office at the corner of St. Lawrence and Ontario streets; that plaintiff neglected to make such entry after sorting such letters found in his bag.

The defendant further states that it was also the duty of plaintiff after making his round and finding that said letter could not be delivered, to make his entry in said book, and return the letter to the head of the office, which he did not do; that he had reasonable cause and ground for belief that the plaintiff had stolen the letter in question, and he therefore prays the dismissal of plaintiff's action.

The facts are as follows:—

Previous to the 5th of January, 1901, many complaints of the loss of registered letters, addressed to persons residing within the district No. 48, had been made, and the post office department had resolved to test the honesty of the plaintiff, who

was letter carrier in that district, by inserting in his bag decoy letters,—one of which should be to a real person at a real address, and the other to a fictitious person at a fictitious address. Several small bills were placed in this last letter, so that it would be easily noticed that the letter contained enclosures. There is no doubt that these letters were on the 5th of January, in the morning, stamped with the ordinary stamps at the central post office in the city, and placed in plaintiff's bag.

The manner in which said delivery was conducted was this :

The city is divided into a certain number of districts, each of which districts has its letter carrier. The district of the plaintiff was No. 48. There were as many bags, that is, letter carriers' bags, as there were districts. There is a central office for a series of districts. The central office situated on the corner of St. Lawrence and Ontario streets serves nine districts. There are pigeon-holes provided in the central office, which are numbered for each of said districts, and when letters are mailed they are sent to that particular department, and are distributed in these pigeon-holes according to their address, which pigeon-hole is numbered with the number belonging to the distribution district. When the time comes for the despatch of the mail to these districts, the letters are taken from these pigeon-holes and are put into the letter bags of the letter carriers, according to their numbers. These letter bags for any given district are then placed in a large bag, which is sealed, and they are delivered to the mail carrier to be taken to the office of the headquarters of the district to which the enclosures belong.

Between nine and ten o'clock it is proved that the letters in question were placed by the officers, who were carrying out the plan, in pigeon-hole No. 48, just before the time when the letters were to be taken out of that pigeon-hole and put into the letter carrier's bag. One of the officers remained standing by after having put said letters into the pigeon-hole until he saw the clerk, whose duty it was to do so, take the whole of the letters out of that pigeon-hole, put them into the corresponding bag

numbered 48, and put that bag with the other bags belonging to the district into the larger bag, which was sealed and delivered to the mail carrier. Thereupon the said two officers of the department, who were carrying out their plan, took the defendant, who was in their employ as a detective and peace-officer, and proceeded to the headquarters of the division in which No. 48 was situated.

When the mail arrived at said headquarters, it was the duty of the head of the office to unlock the bag and take out the other bags belonging to the different letter carriers attached to his office. These letter carriers would then each take the bag which belonged to him, and they would sit down at a desk, provided for that purpose, and take the letters out of their bags and sort them in rotation of streets, so as to facilitate delivery. Thereupon, after having so sorted their letters, it was the duty of the letter carriers to proceed promptly with the delivery of the same. It was also the duty of the letter carrier to know all the addresses within his district, and if an address appeared upon a letter which did not exist, it was his duty not to take that letter out of the office, but to go and enter it in a book provided for that purpose, and to deliver the letter to the head of the office. It was also his duty, if he had, by inadvertence, taken a letter which was addressed to a number which did not exist, or to a person who could not be found, to enter the letter in the same way in the book, and deliver it to the head of the office.

After the plaintiff had started upon his round after the reception of the mail in which said letters were contained, the defendant, together with the two post office employees referred to, entered the head office in which No. 48 was situated, examined the book where the letter in question ought to have been entered, and found that no entry had been made. Thereupon one of the post office employees went to the address of the other letter, which bore a real address, and it was duly delivered about twelve o'clock. The said defendant and post office inspectors then waited until the plaintiff had started upon his

next delivery, which began about one o'clock. They then visited the head office of the said district, examined the book again, and found that still no entry of said letter had been made. They thereupon followed the plaintiff on his round, and defendant, under instructions of the post office department, stopped the plaintiff, made a charge against him, carried him to the house, as alleged in the plaintiff's declaration, and there searched him; plaintiff, however, making no objection to the search.

The proof does not establish any circumstances of publicity in the transaction. The letter in question bore the stamp of the post office of the 5th January, with the figure "3," which indicated third delivery, but the third delivery for the centre of the city corresponds with the second delivery for the places lying towards the suburbs. That figure "3" would indicate that the letter was stamped in the central office between nine and ten in the morning. The two letters were placed together by one of the inspectors in pigeon-hole No. 48. One of these letters was duly delivered by the plaintiff, at the time when it should have been delivered, that is to say, upon the round which he made immediately after the reception of the letter bag, alleged to contain the two letters. The letter in question was again posted in the central office on the evening of the 6th, and bearing the stamp of that date, and arrived in due course in the hands of the plaintiff on Monday morning, the 7th.

The question under these circumstances is, can the defendant be condemned for having made a false arrest? No such condemnation can be made unless the action of the defendant was dictated by malice, and was without any probable cause.

The Criminal Code, art. 326, provides against the stealing of any post letter whether it contains any money, other valuables or not. Also by sec. 89 of the Revised Statutes of Canada, ch. 35, where it is provided that "everyone who unlawfully opens or wilfully keeps, secretes, delays or detains, or procures, or suffers to be unlawfully opened any post letter bag or any post letter—whether the same came into the possession

of the offender by finding or otherwise howsoever—is guilty of a misdemeanour.”

The plaintiff, examined as a witness, states that he did know on the morning of the 5th January, 1901, that there was no such address as No. 35 Laval avenue, and further, that he did know that it was his duty not to take any letter which was improperly addressed, out of the office, but to enter it in the book and deliver it to the head of the office, plaintiff relying upon the allegation made by him that he never received that letter and knew nothing about it until he received it on Monday morning, the 7th of January, two days following.

Now, supposing plaintiff's allegation that he never received the letter and never, at any rate, knowingly had possession of it, is true, it still remains that the department certainly believed that plaintiff did receive the letter; that it was to be entered in his book. So far as defendant was concerned, when he made the arrest of plaintiff he was manifestly convinced that plaintiff had received the letter in question. That being the case, it would be proper to enquire whether, at the time the arrest was made, defendant, believing that the plaintiff had received this letter about ten o'clock in the morning, was justified in believing that he had dealt with it in such a way as to make him guilty of some criminal offence at three o'clock in the afternoon.

Where a person charged with the carriage of letters deals with them in a way contrary to his duty, that is, where, as in this case, the plaintiff, whose duty it was (supposing him to have received the letter), to enter it in a book and to deliver it immediately to the head of the office, and not to take it out of the office, nevertheless violates that duty, and does not enter the letter nor deliver it, but takes it out of the office, such a taking would, of itself, constitute a larceny of the letter, unless plaintiff could justify himself in so doing by some explanation.

Prima facie, seeing the admission of the plaintiff that he knew that no such address as 35 Laval avenue existed, and that he knew the rule of the office regulating his action with regard to a letter so addressed, an officer would have been justi-

fied in arresting plaintiff for larceny of that letter, immediately after removing it from the head office.

The defendant and post office authorities who were working with him, waited there until plaintiff had completed his first round, and until he had departed on his second round. In order to make certain that plaintiff had not inadvertently been unaware that no such address at No. 35 Laval avenue existed, defendant only arrested him when he (plaintiff) could no longer claim to be so unaware. By waiting so long, the plaintiff had an opportunity of stealing the letter in question, if he had desired so to do.

It might be sufficient to say that under these circumstances the action of the defendant cannot for one moment be regarded as malicious or without probable cause, which would result in the dismissal of plaintiff's action, but, if obliged to go further, the proof leaves no doubt that the letter in question was put in the plaintiff's bag, which came into his possession about ten o'clock on the 5th January. How did it get from that bag again into the central post office on the next day? Of course, it is possible that plaintiff may have dropped it, overlooked it, and that some person finding it may have reposted it. This, though possible, is quite improbable.

The plaintiff, finding his position more or less dangerous, might, on the other hand, have supposed that by reposting the letter the proof against him would be weakened, and there could have been little or no difficulty in his reposting it.

The idea that the inspectors at the post office could have concocted a conspiracy against the plaintiff must be dismissed as futile.

It might perhaps be thought that a letter which was not put in the post office in the ordinary way,—intended for delivery, from one person to another, was not a post letter within the meaning of the Criminal Code. That position is not sustained by authority. A case which bears somewhat upon the circumstances of this case, namely, that of *Regina v. Young*, which may be found in 2 C. & K., p. 466, was as follows:—

The president of a department in a post office put a half-sovereign into a letter, on which he wrote a fictitious address, and dropped the letter with the money in it into the letter-box of a post-office receiving house, where the prisoner was employed in the service of the post office. The prisoner stole the letter and money. Held: that this was a stealing of a post-letter containing money, and that it was not the less a post-letter because it had a fictitious address.

The defendant in the present case, when he arrested the plaintiff, did so certainly believing that the plaintiff had received the letter in question on the morning of the 5th January, and had dealt with it in a manner contrary to his duty; had carried it out of the office when he should have delivered it to his principal, and had not entered or reported it in the book provided for that purpose. This action would constitute a larceny, and, even if not a larceny, a wilful detention of the letter on plaintiff's part, and would justify the defendant in making the arrest.

I find, therefore, that plaintiff's action is unfounded, and it is dismissed with costs.

Action dismissed.

N.B.—The above judgment was affirmed by the Court of King's Bench on 29th April, 1902.

St. Pierre, Pélissier & Wilson, for the plaintiff.

G. F. O'Halloran, for the defendant.

Auguste Lemieux, counsel for the defendant.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

BEFORE TOWNSHEND, J., IN CHAMBERS.

THE KING v. LAURA CARTER, ET AL.

Disorderly house—Inmate—Form of conviction—Summary conviction or “summary trial” — Distinction in procedure — Excess of punishment under procedure adopted—Construction favouring right of appeal—Cr. Code, secs. 207 (j), 208, 783 (f), 788—Code forms WW., QQ.

1. Where a conviction made by a city police or stipendiary magistrate for being an inmate of a disorderly house follows the Code form WW. and does not recite that the accused was “charged” before him in the words of form QQ., the inference is that the prosecution is brought under the vagrancy clauses (207 (j) and 208) and not under the summary trials procedure, secs. 783 (f) and 788. (*Per TOWNSHEND, J.*)
2. Where the proceedings are taken under the “summary convictions” procedure, a conviction inflicting a punishment in excess of that authorized on summary conviction cannot be supported in habeas corpus proceedings as a conviction on “summary trial” under which the punishment inflicted is authorized, notwithstanding that the magistrate was one authorized to hold a summary trial, and that the offence was of the class for which the consent to such trial is dispensed with by statute. (*Per TOWNSHEND, J.*)
3. As there is an appeal from a summary conviction on such a charge and none from a conviction on summary trial, a strict construction of the proceedings is required in favour of the preservation of the right of appeal. (*Per TOWNSHEND, J.*)
4. An application for the prisoner’s discharge on the return of a writ of habeas corpus may after refusal by one Judge in Chambers, be renewed before another Judge in Chambers, and the latter may grant a discharge notwithstanding its refusal by a Judge of co-ordinate jurisdiction. (*Per TOWNSHEND, J.*)

DECIDED: July 3rd, 1902, and July 9th, 1902.

Motion under Chapter 181 Revised Statutes of Nova Scotia 1900, on the return of a writ of habeas corpus and an order directed to the convicting magistrate under sec. 7 of that statute to return the record before him, for the discharge of the defendant, a prisoner in the city prison at Halifax under a warrant of commitment in execution, signed by the stipendiary magistrate for the city of Halifax, and reciting a conviction made against her by that officer, which was as follows:—

“Be it remembered that on the 12th day of June in the year one thousand nine hundred and two in the police court in the city of Halifax, Laura Carter is convicted before the under-

signed stipendiary magistrate and one of His Majesty's Justices of the Peace in and for the said city of Halifax, for that she the said Laura Carter in the said city of Halifax in the month of May, A.D. 1902, unlawfully was an inmate of a disorderly house, that is to say, a house of ill-fame, at (stating the street and street number), in the said city of Halifax.

"I find the costs of prosecution do not exceed two dollars, but do not award costs against defendant.

"And I adjudge the said Laura Carter for her said offence to forfeit and pay the sum of sixty dollars, to be paid and applied according to law; and if the said sum be not paid forthwith I adjudge the said Laura Carter to be imprisoned in the city prison of the said city of Halifax for the term of five months unless the said sum be sooner paid.

"Given under my hand and seal the day and year first above mentioned at Halifax aforesaid.

"(Signed), GEORGE H. FIELDING, (L.S.),

"Stipendiary Magistrate in and for the City of Halifax."

The commitment as returned to the habeas corpus by the keeper of the city prison was in the form "FFF." and the information originating the proceedings and the conviction thereon as returned by the convicting magistrate were in the forms "C" and "WW," respectively, in the Criminal Code 1892.

Sarah Carter and Thomas F. Brindley, who were convicted and committed under similar circumstances and under the same procedure for being an "inmate" and "keeper" respectively of the same house and adjudged to pay each the same penalty and in default to be imprisoned each for a like term as the said Laura Carter, also moved at the same time under writs of habeas corpus issued on their behalf, to be discharged out of custody. It was agreed between counsel representing the Crown and the prisoners that the decision in Laura Carter's case should govern the other two.

This application was first made to RITCHIE, J., in Chambers, and that learned Judge having refused the motion, the prisoners

renewed their application before TOWNSEND, J., in Chambers, on July 4th, 1902, the same counsel appearing.

HALIFAX, July 2nd, 1902.

John J. Power, for the prisoners.

Andrew Cluney, for the Attorney-General of Nova Scotia.

HALIFAX, N. S., July 3rd, 1902.

RITCHIE, J.:—This is an application under Chapter 181 Revised Statutes of Nova Scotia "Of securing the Liberty of the Subject" for the discharge of a person convicted by the stipendiary magistrate of the city of Halifax. The contention is that the accused was convicted of "vagrancy" under Part XV. of the Criminal Code and the punishment awarded is excessive. If it is clear that the accused was convicted as a vagrant she must be discharged as the punishment is excessive and not warranted by that part of the Act. The conviction is for unlawfully being an inmate of a disorderly house, that is to say, a house of ill-fame, in the city of Halifax. The offence of being an inmate of a house of ill-fame is indictable and is one of the offences which this stipendiary magistrate has been given jurisdiction to try in a summary way under Part LV. of the Criminal Code and in which he has absolute jurisdiction not depending upon the consent of the person accused. If the person convicted was tried under that part of the Code the penalty imposed is within the Act.

The argument of the counsel for the prisoner was that the magistrate must have proceeded under Part XV. because the conviction he made is in the form given to be used in summary convictions. It is equally arguable that the magistrate was proceeding under Part LV. because he imposed the punishment provided by sec. 788 and not sec. 208. It seems to me that the test is whether or not the conviction is bad under Part LV. If the form given as applicable to Part LV. is strictly followed it would in this case be as follows:—"Be it remem-

bered that on, etc., *Laura Carter being charged before me*, the undersigned stipendiary magistrate of the said city of Halifax, is convicted before me for that, etc." The only difference in the conviction returned is that the words "being charged before me" have been omitted. Does this make the conviction defective or require me to hold that it was made under Part XV. of the Code and not under Part LV.?

The omitted words in my opinion are principally applicable to cases where the consent of the accused is required to give jurisdiction and their omission cannot affect the jurisdiction of the magistrate to try this offence summarily or make the conviction bad in view of secs. 800 and 807.

The case of *Regina v. Stafford*, Canadian Criminal Cases 239, was cited to me in which Mr. Justice TOWNSHEND discharged a prisoner under somewhat similar circumstances as these under consideration. It is impossible to ascertain from the report whether the facts were entirely similar in both cases, but the Judge there came to the conclusion as a matter of fact that the proceedings were under Part XV., a result which I have been unable to arrive at in this case.

In my opinion the application must be refused in this case, as well as in the other two cases, in which the facts are the same.

On the following day the application was renewed before TOWNSHEND, J., in Chambers.

HALIFAX, N. S., July 9th, 1902.

TOWNSHEND, J.:—The defendant was convicted on the 12th of June last for unlawfully being an inmate of a disorderly house in the city of Halifax, and adjudged for such offence to pay a fine of \$60.00, and if not paid forthwith to be imprisoned in the city prison for five months unless sooner paid. Application is now made for her discharge on the ground that the imprisonment so awarded is in excess of the stipendiary magistrate's jurisdiction. The same question precisely was

before me in the case of *The Queen v. Stafford*, 1 Can. Cr. Cas. 239. In the report of that case all the sections of the Criminal Code are printed which it will be necessary for me to refer to, and were it not that Mr. Justice RITCHIE, to whom an application in this matter has already been made, and refused, took a different view I should not think it necessary to examine the statutes and authorities anew. Not wishing to repeat what has already been said in *The Queen v. Stafford* more than is necessary, I may briefly say that the whole question turns on the point, whether it appears from the papers before me that the magistrate proceeded under, and convicted the defendant under, secs. 207 (*j*) and 208 of the Criminal Code. If he has done so, and if it necessarily appears from the papers that he did so, then Mr. Justice RITCHIE agrees that the punishment was in excess of the magistrate's jurisdiction. The learned Judge however is of opinion that inasmuch as the offence of being an inmate of a house of ill-fame may be tried in a summary way under Part LV., secs. 783 (*f*) and 784, in which case the magistrate's jurisdiction to award the punishment given is clear, and as he can find no evidence that she was not, the conviction stands good.

Now it is clear beyond controversy that for some reason there is a marked difference made in the Code, both in the procedure and in the punishment to be awarded, and as I must assume the difference was so made for some good reason, it is my duty to give effect to the law as it is, as I am not justified in asserting that the magistrate intended to proceed under a section giving him jurisdiction, when all his proceedings are under another section which does not give him jurisdiction.

On examining the record returned by the stipendiary magistrate I find that all the proceedings leading up to the conviction and the conviction purport to be taken under secs. 207 (*j*) and 208.

The form of conviction used in this case is WW. which is authorized by sec. 859 of the Code, which form differs from form QQ. in this respect, that in the latter there is a recital that the defendant was "charged before me" which is authorized

by sec. 807. If the stipendiary magistrate intends to proceed under sec. 783 then both the form and that section provide "whenever any person is charged before a magistrate, etc." The recital in the conviction does not allege this defendant to have been "charged before me," but does say, as in WW., "that she is convicted, etc." It seems to me as clear as can be that, for reasons best known to himself, the stipendiary was acting only under secs. 207 (*j*) and 208. I cannot admit that the omission of the words was immaterial as stated by Mr. Justice RITCHIE.

One result of being prosecuted under these two sections is that the defendant has a right of appeal which under the other she has not. Vide secs. 879 and 808; *R. v. Egan* (1896), 1 Can. Cr. Cas. 112, 11 Man. L.R. 134; *R. v. Nixon*, 5 Can. Cr. Cas. 32; *R. v. Bougie*, 3 Can. Cr. Cas. 487. This I take of itself is of sufficient importance to require a strict construction.

Again sec. 808 provides that the procedure under "Summary Convictions" (Part LVIII.) should not apply to proceedings under Part LV., secs. 783 and 788. I dissent from Mr. Justice RITCHIE's view entirely that the omitted words are only necessary when the accused is required to give consent for jurisdiction.

An examination of the forms shews at once that two cases are provided for, that is to say, where consent is not necessary and where it is. I also think the test suggested a fallacious one. If there is any importance in the difference between the two clauses as to procedure, punishment, etc., the all important inquiry must be under which clause of the statute did the proceedings in question originate? That point, as already stated, is conclusively settled by the stipendiary himself, and it is not for me on an application of this kind to make valid, or hold to be valid under another clause, a conviction which is clearly excessive when the proceedings adopted are inquired into.

Had it been possible I would have referred the question to the full Court in view of the difference of opinion which exists, but in the matter of the liberty of the subject I am of course obliged to act at once, and while regretting my inability to come

to the same conclusion as my learned brother RITCHIE, I must follow my own conscientious convictions of the meaning of the statute. The prisoner must therefore be discharged. This will apply to the two other cases before me—Sarah Carter (inmate) and Thomas F. Brindley (keeper). No costs, and no action to be brought against any officials. There was no contest before me that it was not competent after one Judge had refused a writ, for another Judge of the same Court to grant it.

Prisoners discharged.

Note: *Successive applications for habeas corpus.*

Walkem, J., of the Supreme Court of British Columbia decided in *Re Bowack* (1892), 2 B.C.R. 222, that it was competent for him as a Judge of that Court to grant a writ of habeas corpus and thereunder to discharge a prisoner after an unsuccessful application for the writ had been made by the same party to another Judge of the same Court. See also *Ex parte Partington*, 13 M. & W. 679, and *Re James William Black*, Congdon's Nova Scotia Digest 614, and note page 245, ante.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS AND GARROW,
JJ.A.

THE KING V. D'AOUST.

Evidence—Prisoner as a witness—Charge of robbery—Cross-examination as to previous convictions for indictable offences—Relevancy—Credibility of witness—Character evidence—Canada Evidence Act, sec. 5.—Cr. Code secs. 676, 694, 695.

1. An accused person examined as a witness on his own behalf, may be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character had been adduced for the defence.
2. The question is relevant to the issue as affecting the credibility of the accused as a witness.

ARGUED: April 18, 1902.

DECIDED: May 8, 1902.

THIS was a case reserved by the county Judge sitting in the county court judges criminal court of the county of

Carleton, at Ottawa, on February 27th and 28th, 1892, on the trial of one Xavier D'Aoust upon an accusation or indictment, charging him with robbery of a sum of money from one Gravelle.

The case (after setting out the charge, date, etc., as above), stated:—

“The accusation did not charge the prisoner with any previous conviction.

Witnesses were examined for the Crown and for the defence.

The prisoner was sworn and examined on his own behalf, and denied the commission of the offence.

Mr. J. A. Ritchie, for the Crown, in the course of his cross-examination of the prisoner, put the following question:

‘You have been convicted several times of indictable offences?’

Mr. E. Mahon, for the prisoner, objected that the prisoner could not be questioned as to previous convictions.

After hearing argument, I overruled this objection, and thereupon the prisoner answered the above question in the affirmative; and the following further questions were put to the prisoner and answered by him subject to such objection:—
[The case then set out questions as to five different convictions for indictable offences, all of which the prisoner admitted.]

The evidence of previous convictions of the accused had effect upon my mind in arriving at a decision.

I found the prisoner guilty and sentenced him on the 24th day of March, 1902, to nine months' imprisonment in the Central Prison.

Upon the application of his counsel I reserved the following question for the opinion of the Court of Appeal for Ontario:

‘Was the evidence of the previous convictions of the prisoner admissible?’”

TORONTO, April 18th, 1902.

John R. Cartwright, K.C., Deputy Attorney-General for the

Crown, contended that when an accused person tendered himself and was examined as a witness on his own behalf, he was on the same footing as any other witness, and was not entitled to any special protection.

The prisoner was not represented by counsel on the argument of the reserved case; but his counsel furnished a written argument, which was read by the Deputy Attorney-General to the Court. It was to the effect, that the Crown could not prove the convictions by other witnesses, and that no evidence should be admitted not relevant to the issue: Crankshaw on the Criminal Code, pp. 819-820. When the Canada Evidence Act, 1893, was passed making the accused a competent witness, it was not intended to alter the nature of the evidence on the trial of an accusation, or it would have been made clear by express legislation. The accused is protected where, under section 676 of the Code, he is charged with an offence after previous convictions; he must be found guilty of the offence before the previous convictions can be referred to, although charged in the indictment. The accused being on trial, puts him on a different footing from an ordinary witness; he may be harmed, while the witness is not. No evidence of character was given here, to call for evidence of previous convictions to counteract it. While an accused person may be cross-examined as laid down in *The Queen v. Connors* (1893), 5 Can. Cr. Cas. 70, at p. 72, such cross-examination is restricted to the issue or charge: 3 Russell on Crimes, 6th ed., p. 403; and as the evidence admitted affected the mind of the Judge, there should be a new trial.

TORONTO, May 8th, 1902.

ARMOUR, C.J.O.:—The accused was charged with robbery, and being called as a witness on his own behalf, was asked by the counsel for the Crown, on cross-examination, whether he had not been convicted several times of indictable offences.

This question was objected to by counsel for the accused, but was allowed by the learned trial Judge, and was answered by the accused in the affirmative.

Counsel for the Crown thereupon questioned the accused as to five previous convictions, all of which the accused admitted, and the question submitted to us is whether the evidence of the previous convictions of the accused so obtained was admissible.

In the Imperial Criminal Evidence Act, 1898, 61 & 62 Vict. ch. 36, there is a provision that a person charged and called as a witness in pursuance of that Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless under the circumstances in the said Act set forth.

But in the Canada Evidence Act, 1893, as amended by 61 Vict. ch. 53, and by 1 Edw. VII. ch. 36, there is no such provision, nor is there any other provision limiting in any way the cross-examination of a person charged with an offence who becomes a witness on his own behalf.

I am of the opinion, therefore, that the evidence of the previous convictions, elicited on the cross-examination of the accused, was admissible.

OSLER, J.A.:—The prisoner was tried at a session of the county judges criminal court at Ottawa upon an accusation or indictment charging him with the offence of robbery of a sum of money from one Gravelle.

He was sworn and examined on his own behalf, and denied the commission of the offence.

In the course of his cross-examination by counsel for the Crown, he was asked the following question: "You have been convicted several times of indictable offences?"

Counsel for the prisoner objected that he could not be questioned as to previous convictions. After argument, the objection was overruled, and the prisoner thereupon answered

the question in the affirmative, and other questions were put to the prisoner as to five convictions for indictable offences, and answered by him, subject to such objection.

No evidence of good conduct had been adduced on behalf of the prisoner.

The learned Judge of the county court reported that the evidence of previous convictions of the accused had effect upon his mind in arriving at a decision, and he found the prisoner guilty, and sentenced him on the 24th March, 1902, to nine months' imprisonment in the Central Prison.

Upon the application of his counsel, the Judge reserved the following question for the opinion of the Court of Appeal: "Was the evidence of the previous convictions of the prisoner admissible?"

In my opinion this question admits only of an answer in the affirmative.

By statute—the Canada Evidence Act, 1893, and its amendments, 61 Vict. ch. 53 and 1 Edw. VII. ch. 36—it is enacted that every person charged with an offence shall be a competent witness. Such person is not a compellable witness, and therefore cannot be directly called upon to testify by or on behalf of the Crown.

When this provision was introduced, it had long been the law as now found in sec. 695 of the Criminal Code, 1892, that a witness might be questioned as to whether he had been convicted of any offence, and if upon being so questioned he either denied the fact or refused to answer, "the opposite party" might prove such conviction by a certificate of the proper officer, in manner and form prescribed by section 694, and by proving the identity of the witness, as such convict.

The right, and if such it can be called, the privilege, of the accused now is to tender himself as a witness. When he does so he puts himself forward as a credible person, and except in so far as he may be shielded by some statutory protection, he is in the same situation as any other witness, as regards liability to and extent of cross-examination.

The Imperial Criminal Evidence Act, 1898, 61-62 Vict. ch. 36, carefully provides that a person charged and called as a witness on his own behalf shall not, except under certain specified circumstances, be asked, and if asked, shall not be required to answer, questions tending to shew that he has committed or been convicted of or charged with any offence other than that wherewith he is then charged, or is of bad character.

This may have been done out of tenderness for the accused, who may feel himself, as he no doubt in most cases is, under a sort of moral compulsion to give evidence for himself, the Act having removed his previous disability in that respect, or it may have been in order to avoid any, even apparent, inconsistency with the provision, corresponding to that of section 676 of the Criminal Code, which deals with the proceedings upon an indictment for committing an offence after a previous conviction or convictions.

There, the prisoner is to be arraigned in the first instance upon so much only of the indictment as charges the subsequent offence; the trial of the question as to previous convictions being deferred until he shall have been found guilty of that offence.

Our Criminal Evidence Act contains no sections corresponding to those of the Imperial Act; the only exception it makes to the competence of the accused to testify being in respect of communications made by husband to wife or by wife to husband during their marriage.

Practically, therefore, although the provisions of section 676 must be complied with, whenever it is intended for the purpose of imposing an increased punishment, to try the question whether the accused has been convicted of previous offences, he incurs the risk if he chooses to testify on his own behalf of having such convictions proved against him for the purpose of affecting his credit, and thereby incidentally of prejudicing his position with the jury in regard to the charge then on trial

—a risk which, by the Imperial Act, it has been deemed proper to exclude.

In the case before us the questions were proper, and the testimony they were intended to elicit relevant to the issue, as going to the credit of the witness, and as authorized by section 695 of the Code.

The accused, instead of refusing to answer, stated without objection what was probably the truth. Had he denied the facts or refused to answer, the only consequence would have been that the Crown might have proved the previous convictions in the manner above stated.

It is, therefore, clear that evidence of these convictions by the accused's own admissions was proper, and that it was open to the learned Judge to draw therefrom any inferences favourable or unfavourable to the accused of which it was justly susceptible.

MACLENNAN, MOSS, and GARROW, JJ.A., concurred.

Conviction sustained.

Note: *Cross-examination of accused tendering himself as a witness.*

In *R. v. Connors* (1893), 5 Can. Cr. Cas. 70, 72, Mr. Justice Wurtelle in delivering the judgment of the Court of Queen's Bench at Montreal, said:—"When a person on trial claims the right to give evidence on his own behalf he comes under the ordinary rule as to cross-examination in criminal cases. He may be asked all questions pertinent to the issue and cannot refuse to answer those which may implicate him. . . . He cannot be compelled to testify but when he offers and gives his evidence he has to take the consequences."

The present case affirms that cross-examination as to previous conviction for any indictable offence is relevant to the issue on the question of credibility, and is therefore permissible. This was the English law before the passing of the Imperial Evidence Act, 1898. *Law Times* (Eng.), Nov. 5, 1887, p. 2; Phipson on Evidence, 2nd ed. 164; *Ward v. Sinfield*, 49 L.J. C.P. 696.

The general rule as to cross-examinations is thus stated by Phipson (p. 478):—"The witness may be asked not only as to the facts in issue or directly relevant thereto, but all questions, (1) tending to test his means of knowledge, opportunities of observation, reasons for recollection and belief, and powers of memory, perception and judgment; or (2) tend-

Note:—Continued.

ing to expose the errors, omissions, contradictions and improbabilities in his testimony; or (3) tending to impeach his credit by attacking his character, antecedents, associations, and mode of life; and in particular by eliciting (a) that he has made previous statements inconsistent with his present testimony, or (b) that he is biased or partial in relation to the parties to the cause, or (c) that he has been convicted of any criminal offence."

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE AND RITCHIE, JJ., GRAHAM, E.J., AND
MEAGHER, J.

THE KING v. ANDREW CONROD.

Liquor license law—Unlawfully selling liquor without license—Statutory presumption—Rebuttal—Conviction of occupant of premises where sale made by person suffered to be thereon—Liquor License Act, R.S.N.S. ch. 100, sec. 111.

1. Where, under a liquor license law, the statute makes proof of the fact of sale by a person who is "suffered to be in or upon the premises" presumptive evidence that the sale took place with the authority and by the direction of the occupant of the premises, and declares that the burden of proof that the sale took place without the occupant's authority or direction shall be thrown upon such occupant, a conviction of the latter will be supported if the facts appear which give rise to the statutory presumption, notwithstanding the express denial under oath by the accused that he had given any authority or direction to sell or that he knew of the sale being made.
2. The magistrate trying such a charge may give effect to the statutory presumption as against the unqualified denial by the accused under oath, if he does not give credence to such denial; and the accused can only be said to have satisfied the burden of proof, which the statute casts upon him, when his denial is believed.

ARGUED: Feb. 7, 1902.

DECIDED: Feb. 22, 1902.

AN appeal from the judgment and order of the county court judge for District No. 1 at Halifax affirming a conviction made on October 15th, 1901, by John McDougall, Esquire, stipendiary magistrate in and for the county of Halifax, against

the defendant Andrew Conrod, for that he within the space of six months last past previous to the information, which is dated the 10th of October, A.D., 1901, at West Chezzetcook, in the municipality of the county of Halifax, in the said county of Halifax, unlawfully did sell liquor by retail without the license therefor by law required.

The grounds of the appeal were :

(1) That there was no evidence to sustain the conviction.

(2) That the said conviction was against the weight of evidence.

(3) That the stipendiary magistrate made an illegal minute of conviction by omitting "hard labour."

The evidence taken by the convicting magistrate and used under the statute and rules of Court on the appeals to the county and supreme courts was as follows :—

Alexander LaPierre, sworn. (Examined by Mr. McLellan.)
—I live at West Chezzetcook, in the municipality of Halifax county, in the county of Halifax. Know Andrew Conrod, the accused. Live about a quarter of a mile from him. I was at his house about a month ago. The accused was there. No one else there. I was there about 10 minutes. Only been in the house once within the last year. I went up to see if accused had any liquor to drink. He had none for me. I asked accused for liquor. I did not get any. No one else there as I knew of. I did not see Mr. Conrod's son there. Accused said he had none. Never saw Walter Julien or Alex. Bellfountain at Conrod's.

(Examined by magistrate.)—I got some liquor from his son about a month ago. Son of accused is named Andrew Conrod. I got it from his son on the road, about an eighth of a mile from Conrod's house. I got one bottle of rum. I paid 50c. for the bottle. The son lives with the father, the accused. I was going to Conrod's house when I met his son. I made no previous arrangement to meet the son. I don't know where the son got the liquor. He did not tell me.

Cross-examined by Mr. Rowlings.—The accused's name was never mentioned between us at the time I got the liquor. The son must be over 23 years old.

Walter Julien, sworn. (Examined by Mr. McLellan.)—Live at West Chezzetcook. I had never been in the house of accused in my life. Accused has wife, son and three small children. Know accused and his son Andrew. I never got any rum from the accused. Don't know if anyone else did. I have passed along the road last week. I passed his house frequently. I was never on accused's premises. I never got any liquor from accused or his son, nor never saw anyone else get any.

John LaPierre, sworn. (Examined by Mr. McLellan.)—Live quarter mile from Andrew Conrod's. Know the accused and his son Andrew. Andrew lives with his father. I was in house of accused about a month ago. I was there alone. I was there about 10 minutes. I went there to see if he had any liquor. I got rum there. It was a bottle of rum. I paid 50c. for the bottle. The accused was not present. I got the liquor from his son Andrew. I took the liquor away from the house. (All objected to).

Cross-examined by Mr. Rowlings.—I drank some of the liquor out of the bottle. I am sure it was rum. There were others who got some of it. It did not make them drunk. I won't swear exactly when it was. It may have been June. Mr. Conrod's name not mentioned at the time I got the liquor.

Re-examined:—I got the liquor about two months ago. That was the only time I got liquor. Have never seen anyone get liquor there within six months last past.

Alfred Bellfountain, sworn. (Examined by Mr. McLellan.)—Live at West Chezzetcook. I know accused and his family. I visit his house. I was at his house about a month ago. I was there frequently before that. I went there for liquor. I got some. It was rum. I paid 50c. for bottle. I have seen accused there frequently. Accused not there when I got the rum. I got liquor two or three months ago at accused's house. I got liquor at accused's house five or six times within past six

months previous to 9th October. Whenever I drank liquor in the house I drank it alone. I treated others outside.

Cross-examined by Mr. Rowlings.—I never bought liquor from accused. Accused's name never mentioned at any time.

By the magistrate.—I asked accused once for liquor, but could not get it. When I got liquor there the family would be there, but were not in the room with me.

Prosecution rest.

Defence calls.

Andrew Conrod, sworn. (Examined by Mr. Rowlings.) I was not present when any of the parties got liquor from my son. It was done without me knowing anything about it. I gave no authority to my son to sell liquor. I kept no liquor for sale at any time. My son is between 22 and 23 years of age I believe.

Cross-examined by Mr. McLellan.—I can't remember John LaPierre being there at the time he mentioned. He has been often there. I never saw Alfred Bellfountain at my house. My son occupies a room in my house as his own. He has gone away to States. Went last Wednesday week. My son could sell rum without me knowing it. I don't know if I could stop my son selling it. I am not supposed to know that liquor was sold. I am not supposed to know.

By magistrate. — I know Alex. LaPierre and Alfred Bellfountain. Alfred Bellfountain never asked me for liquor. LaPierre did not ask me.

HALIFAX, N.S., Feb. 7, 1902.

John J. Power, for the defendant, cited R.S.N.S. 1900, ch. 100, sec. 86, sub-sec. (2a), secs. 111, 122, 135, 150c: Sinclair's Liquor License Manual, pages 254, 257; Paley on Convictions, 7th edition, pages 80 and 81; *Reg. v. Williams*, 42 U.C.Q.B. 464; *Reg. v. Breen*, 36 U.C.Q.B. 87; *Chisholm v. Dalton*, 22 Q.B.D. 736 at page 739-741; *Somerset v. Wade*, [1894] 1 Q.B. 574; Lawson on Presumptive Evidence, page 576, Rule 120;

44 Am. Dec., page 633 ; *Reg. v. Purley*, 25 N.B.R. 43 ; *Ex parte Melanson*, 28 N.B.R. 660 ; *Reg. v. McDonald*, 26 N.S.R. 409 ; *Reg. v. McDonald*, 27 N.S.R. 161 ; *Reg. v. McKenzie*, 23 N.S.R. 20 ; *Reg. v. Grant*, 30 N.S.R. 375 ; *per* Townshend, J.

Hon. A. Drysdale, K.C., and *Wilson W. McLellan*, for the magistrate and informant, contra.

HALIFAX, N.S., Feb. 22, 1902.

WEATHERBE, J. (dissenting) :—Apart from the statute law this is a conviction for crime not only without evidence but against the positive uncontradicted evidence of the accused.

There was not only no proof that he sold liquor but none that he had any knowledge of the sale. Witnesses for the prosecution shewed that he did not traffic in such sale but also that he was absent at the time of the alleged sale, and that the sale was made by another person.

There is no evidence whether he was habitually at home or whether he was employed away from home.

The sale was by a son 22 or 23 years of age who, according to the only evidence on the subject, had a room of his own in the house but was living with the occupant of the house. There is no pretence that the son was employed by the father. Certainly he was his own master and the father swears distinctly enough that he gave no authority for the sale and was not aware of it, and that he did not know that he could prevent his son selling liquor. If what the father swears is not perjury that the son had a room of his own, in the same way the law says he would not be supposed to know of the sale. It is clear that the father did not concoct a false scheme of separate apartments because the evidence of that fact was disclosed by the prosecution. It is to be noted that the father's evidence was in no way impeached although the justice (unaware that he was raising collateral issues which the prisoner could not be prepared and would not be allowed to try out) provoked a contradiction of one of the witnesses on a

wholly irrelevant question which however no doubt determined the matter in the mind of the justice and the county Judge.

It will not in short be pretended in the circumstances that the conviction could stand but for the special legislation copied from the Ontario Statute, upon which the decision appealed from is based.

The statute provides that the "occupant" of a "house" or "place" where liquor is sold is liable for the sale by another person who "cannot be proved" to have acted for the accused.

"The occupant of any . . . place in which any sale of liquor . . . has taken place shall be personally liable to . . . imprisonment . . . notwithstanding *such sale* . . . was made by some person *who cannot be proved to have so acted* under the direction of such occupant."

Because it is abundantly clear that a conviction and imprisonment are contemplated *without proof* against the accused, the objection that such legislation is in derogation of the fundamental principles is absurd, for it is so intended on the ground of stringent necessity in all such legislation, but the rule of interpretation I suppose requires the Act to be most strictly construed whatever may be the rule in ordinary criminal cases. It must not be supposed that in all cases of violation of this liquor law, that the accused is to be held *prima facie* guilty until he proves his innocence. Before the extraordinary provisions of section 111 can be invoked two things must be made apparent. These are conditions precedent. First it must be made evident that the accused was an "occupant" of the "place" of sale. This involves I suppose the necessity of shewing indentically where the place of sale was, and the language of the Act is conclusive that there may be more than one place of sale in the same premises or house.

Secondly, the provisions of section 111 are to be resorted to *only* in cases where "*it cannot be proved that the person selling acted by the authority of the occupant.*" In such cases an occupant shall be personally liable to imprisonment without requiring the enforcement of the ordinary rules of evidence.

Therefore unless for some reason it could not be proved that the person selling acted for the occupant, no part of section 111 was to be invoked. Does this mean that when the thing usually necessary to establish crime *appears to the justice* incapable of proof he may proceed without such proof? Familiar authority shews that this is not the meaning.

Has the justice jurisdiction under section 111 until it is substantially established by the prosecution that agency for *that particular sale* cannot be proved? I am unable to say what the true reading is, but, whatever may be the construction, the words quoted from the last lines of sub-section (1) do not imply that the prosecution may rest on proof of occupancy by the absent accused and the sale by an intruder or trespasser.

That much seems clear enough, although that would be evidence that the *vendor* "*could not be proved*" to have acted for the occupant. One solution of the question lies in the words "*so acted.*" It is clear at all events that the only case in which the justice can convict without proof of agency is in respect of that particular sale then in question. That is where he "*so acted.*" This extraordinary dispensation of proof (found in similar Acts) does not render unnecessary any of the other proofs required by the long established rules of evidence and does not compel us to sustain a conviction where the vendor for example was a temporary trespasser. That would be simply monstrous, though it would be within the literal terms of sub-section (1).

This much will be perhaps admitted that the section at all events covers the case where a person in some way authorized, permitted or suffered by the occupant to be in and have possession of *the place of sale* shall be presumed without further proof to have had authority from such occupant to make the sale proved to have been by such person made. In other words proof of agency and authority required before the Act are not by sub-section (1) dispensed with under the Act except the agency in the sole case of the one sale in question. If any other interpretation is possible it would have been suggested.

Now sub-section (2), which must be read with sub-section (1), says: "Proof of . . . *such sale* . . . by any person *in the employ* of such occupant or who is suffered to remain in or upon the premises of such occupant or to act in any way for such occupant shall be presumptive evidence that *such sale* . . . took place with the authority . . . of such occupant"

Then sub-section (3), the crowning and crucial language of section 111, says "*such* person or employee shall be liable to the same penalty . . . as *his employer*." Reliance is placed on the words "*suffered to remain on the premises*." Torn from the text "*suffered*" governs the words "to act in any way" as well as the words "to remain."

It is claimed that the occupant is liable to imprisonment not only for "*such sale*" but for every violation of the Act merely on proof thereof, though done in the absence of the occupant and without his knowledge by any one suffered to be on the premises solely *for* their own advantage, and though the owner has no control over them whatever. This will include a vast number of people: for example all tenants and lodgers in all hotels and boarding houses and in numbers of private houses or adjoining buildings are in a sense suffered to remain on the premises. So also are all pedlars and vendors of patent medicines containing concealed alcohol or other wares and goods, and all purchasing agents and soliciting purchasers and collectors of rare articles, produce and junk, as well as all beggars and destitute travellers who seek shelter from hospitable "*occupants*," all relatives (more or less welcome) who visit or remain with parents or friends, who neither employ them or have control over them are "*suffered*," I suppose, to be on the **Premises**.

Did the legislature intend the language to apply, as it may apply, to all these without exception and upon what principle? All servants and agents and those on the premises for and at the request of the occupant or other *employees*, under the con-

trol of the occupant who may dismiss, seek redress against, or punish them are expressly included.

Since in many cases the word "or" is read as "and," it may be worth considering when called upon to imprison "without proof" whether the words "any person in the employ of such occupant *or* who is suffered to be or remain upon the premises of such occupant *or* to act in *any* way *for* such occupant" does not require such substitution of the conjunctions, and if necessary with emphasis on the word "*any*." Is the statutable "person" "suffered to be on the premises" one who is supposed to be there "for such occupant"? Without substituting "and" for "or" it will be found to be an obviously proper and grammatical rendering to say that there are two classes included in sub-section (2) namely, those suffered to remain on the premises "for" (that is in the interest of) "such occupant," and also those who, whether on or off the premises "act in any way for such occupant."

It would perhaps defeat the object of the statute if a party employed to be and remain immediately outside "the premises" for the occupant might come upon the premises and commit "the act" without rendering the occupant liable.

It was possibly necessary when the words "*in the employ of such occupant*" were penned, to stop and consider in case of a sale on the premises by such *employee*, first, whether a person merely suffered to be there though "*for*" and in the interest of the occupant could be called "an employee"; and secondly, whether the acts of one employed to act outside the premises should render the occupant of another place liable.

It will be admitted that the language which follows the words "*in the employ of such occupant*," namely, "*or one suffered to be upon the premises*," if qualified by the words "*for the occupant*" would enlarge or render certain the definition of employee.

I submit whether the sub-section (3) does not shew unquestionably that "such occupant" must be intended to be an

“employer” of the person for whose act he is to be imprisoned without proof.

“*Such* person or employee shall be liable to the same penalty as *his employer*.” If “the occupant” was not intended to mean an occupant, who in the same sense engaged or employed the person for whose acts he was to become, in so astonishing a manner, responsible, why were not the words “such occupant” continued in the third sub-section to harmonize with the more severe and more unreasonable construction sought to be placed on the former sub-sections?

If the admittedly extraordinary powers under any construction of section 111 are intelligently and searchingly scrutinized in connection with the passage in Paley and the cases there cited referred to by Mr. Justice Gwynne in *Rex v. Williams*, 42 U.C.Q.B. 464, the difficulty of construction will, I submit, disappear.

The following language of Mr. Justice Gwynne in reference to similar words in the Ontario Act which have been copied in our Act (though in our Act the construction is made more intelligible by other words referred to) are worth perpetuating if the sec. 111 of ch. 100 shall continue among our statutes and require to be enforced:—

“Now, if this section had not been passed, the general rule of law applicable, if the owner of the house where the liquor was sold was the person prosecuted for the offence, would be that, although no one can be made criminally responsible for the acts of third persons, yet the employment of an agent in the defendant’s usual course of business is sufficient evidence in such cases whence the magistrate might, if he thinks fit, presume that such agent was authorized to do the prohibited act with which it is sought to charge the principal—see Paley on Convictions, 5th ed. 72, and cases *ibi*—so that a conviction against a husband or master for the sale of liquor contrary to law might have been sustained upon evidence to the satisfaction of the convicting magistrate that the wife or servant, who actually sold and delivered the liquor, was acting in the discharge of the

defendant's usual course of business: but if the evidence should fall short of satisfying the magistrate's mind upon that point, the wife or servant, who actually sold, would be liable to conviction for the act of sale contrary to law. Now the 52nd sec. of 37 Vict., as amended by 40 Vict., ch. 18, seems to me to make merely that to be conclusive evidence against the occupant which would have been sufficient evidence without the section if it satisfied the mind of the magistrate that the sale took place in the ordinary course in which the defendant carried on his business, with this addition, that the occupant shall be conclusively bound by the acts, not only of all persons in his employment, but even by the wrongful acts of persons upon his premises, whom he suffers to be and remain there." *R. v. Williams*, 42 U.C.Q.B. 464, 465.

If eventually this should be found to be the correct rendering of the section it will tend to minimize the danger of a statute, which, at the best, in terms requires conviction against an occupant where the crime "cannot be proved"—a statute which must necessarily sometimes be the means of entrapping and crushing the innocent.

RITCHIE, J.:—Andrew Conrod was convicted for selling liquor without license contrary to the provisions of ch. 100 Revised Statutes.

Section 111 of that Act provides that the "occupant of any house, shop or room or any other place in which any sale, barter, etc., . . . has taken place shall be personally liable to the penalty, etc., notwithstanding such sale, etc., was made by some other person who cannot be proved to have so acted under or by the direction of such occupant."

This proceeding was originally taken before the stipendiary magistrate for the county of Halifax who convicted the said Andrew Conrod of the offence charged who then appealed to the county court of District No. 1. The Judge of that Court confirmed the conviction and dismissed the summons and an appeal from his decision has been taken to this Court and heard on the evidence adduced before the magistrate.

This evidence is in my opinion quite sufficient to justify the conviction by the magistrate of Andrew Conrod, the owner and occupant of the house in which the sale of the liquor was made by his son, and the confirmation of it by the learned county court Judge.

The counsel for the defendant raised another point in connection with the minute of conviction. The facts in relation to this are as follows: After the trial the magistrate made a minute of conviction at the foot of his minutes of trial that he found the accused guilty and imposed a penalty of \$50 and costs and in default of payment to be imprisoned in the county gaol for the period of sixty days at hard labour.

He then made another minute a little more formal to the same effect. On the same day, the 15th of October, the magistrate caused what purported to be a copy of a minute of conviction to be served on the said Andrew Conrod from which the words "and there kept at hard labor" were omitted: and about an hour after he caused the said Andrew Conrod to be served with another copy of a minute of conviction which contained the words omitted from the other copy and was in accordance with the original minute. I know of no law requiring the magistrate in a case like this to serve a copy of the minute of conviction on the person convicted; but even if there were, the service of an incorrect copy followed by the service of a correct one would not in any way invalidate the proceedings or prevent the magistrate from preparing a conviction in accordance with the original minute he had made, and issuing process to enforce the penalty or imprisonment.

Besides this in my opinion the question as to the effect on the conviction itself of any minute of conviction or the want of it, has been settled by this Court adversely to the defendant's present contention in the case of *The Queen v. McDonald*, 26 N.S.R. 402.

The appeal will be dismissed. As by the Liquor License Act the inspector cannot be called upon to pay costs in ordinary cases, this Court has hitherto refused to allow him costs, but

this rule ought in my opinion to be confined to the first appeal and if the defendant appeals from the county court he must do so at the risk of paying costs if unsuccessful. Speaking for myself alone I shall, in future, act upon this principle in awarding costs.

GRAHAM, E.J.:—This is an appeal from the Judge of the county court for the county of Halifax, confirming upon an appeal a conviction of the defendant by a stipendiary magistrate made under the Liquor License Act R.S.N.S., ch. 100.

By sec. 111 of that chapter it is provided that “the occupant of any house, shop or room or other place in which any sale, . . . in liquors has taken place shall be personally liable to the penalty . . . with respect to such sale . . . notwithstanding such sale . . . was made by some other person who cannot be proved to have so acted under or by the direction of such occupant.”

(2) “Proof of the fact of such sale . . . made by any person in the employ of such occupant or *who is suffered to be in or upon the premises* of such occupant, or to act in any way for such occupant shall be presumptive evidence that such sale . . . took place with the authority and by the direction of such occupant and the burden of proof that such sale . . . took place without the authority or direction of such occupant, shall be thrown upon the defendant.”

(3) “Such person or employer shall be liable to the same penalty as his employee.”

(4) In this section the expression ‘occupant’ *includes*:

(a) “The husband or reputed husband of any married woman or woman so reputed residing in the place . . . or exercising apparent control over the same.

(b) “The father of any minor resident in such place or in apparent possession of or exercising apparent control over the same . . .

(c) “Any person who under any provision of law . . . would be held to be an occupant.”

(5) "Any person coming within any of the definitions of this section shall be severally liable to the penalty . . . and the conviction of one or more of such persons shall not be a bar to the prosecution . . . of the other or others."

The evidence shews conclusively that the defendant was the owner and occupant of the house. He lived there with his wife, son and three small children. Also that his son who is proved to have made the illegal sale of liquor lived with him.

Alexander LaPierre says, "I was at his house about a month ago. The accused was there. No one else there. . . . I went up to see if the accused had any liquor to drink. He had none for me. I asked accused for liquor. I did not get any. . . . I got some liquor from his son about a month ago. I got it from his son on the road about an eighth of a mile from Conrod's house. I got one bottle of rum. I paid fifty cents for the bottle. The son lives with the father, the accused. I was going to Conrod's house when I met the son. I made no previous arrangement to meet the son."

John LaPierre says, "I was in house of accused about a month ago. . . . I went there to see if he had any liquor. I got rum there. It was a bottle of rum. I paid fifty cents for the bottle. The accused was not present. I got the liquor from his son Andrew. . . ."

Alfred Bellfountain says, "I know accused and his family. I visit his house. I was at his house about a month ago. I was there frequently before that. I went there for liquor. I got some. It was rum. I paid fifty cents per bottle. I have seen accused there frequently. Accused not there when I got the rum. I got liquor two or three months ago at accused's house, five or six times within past six months, previous to 9th October. Whenever I drank liquor in the house I drank it alone. I treated others outside."

Cross examined.—I never bought liquor from accused. Accused's name never mentioned at any time. I asked accused once for liquor but could not get it. When I got liquor there the family would be there but not in the room with me."

This evidence shews that at least six sales of liquor were made in the defendant's house by this son and once by him on the road. The evidence shews that the son lived with his father. He was a person suffered to be or remain on the premises.

The evidence in this case under the statute cast the burden upon the defendant of proving that the sales took place without his authority. He denies the knowledge. He says his son is 22 or 23 years of age. But when pressed in cross examination he said: "My son occupies a room in my house as his own. He has gone away to States. Went last Wednesday week. My son could sell rum without my knowing it. I don't know if I could stop my son selling it. I am not supposed to know that liquor was sold. I am not supposed to know."

Then he contradicted Bellfountain and LaPierre by saying they never asked him for liquor, and these men were apparently not unfriendly to him. When he says "I gave no authority to my son to sell liquor" I suppose he thought that unless there was express authority he would not be liable.

I am not surprised that the two tribunals below were not convinced that he had satisfied the burden cast upon him by the statute of proving that the sale did not take place without his authority. It was rather singular that these neighbours should go to the house to buy liquor and even ask him to sell it and obtain it from the son if there was complete ignorance on his part. Without any help from the statute the relationship of father and son would under the evidence as to the surrounding circumstances justify the stipendiary magistrate in inferring agency. I do not think a jury would draw an inference that the son's room in his father's house was a rented room. They would be guided by what is usual and would probably infer as the father had a "wife and three small children" that it was a simple bedroom. The liquor is proved to have been sold in the house. It is not proved to have been sold in this room.

The interpretation of the word "occupant" given in the 111th section extends the liability to others than actual occupants. To husbands, fathers, wives, etc., in certain cases. The defendant is an "occupant" by virtue of the fact that he owned the house and occupied it with his family. He is therefore included although there is no necessity in this case for the provision under paragraph (e).

The object of paragraph (b) is to hold a father liable as an occupant where his minor son resides in or is in apparent possession of or exercises apparent control over the place in which the sale took place. Of course that does not apply to this case.

In my opinion the appeal should be dismissed and with costs.

MEAGHER, J. (Oral):—The story of this room having been let to the son is a myth. Not one of the witnesses called to prove the sale was cross-examined to shew that the sale took place in the room occupied by the son. The sales are shewn to have taken place in the house and not necessarily in this room. When the defendant himself was called he never referred on his direct examination to the fact that the son occupied a room or that a room was let to him. This shews that the theory of the room being let was an afterthought.

The counsel for the prosecution brought out the fact that the son occupied a room in the house as his own, but that is no evidence of a letting, particularly in the light of the fact that the boy was living with his father, from which a jury—or I if sitting as a jury—would infer that he was living with him as a member of his household and occupied the room as a bed room. The Ontario case is the reverse of this—it was against the party who made the sale and has no application. Apart from the statute there is abundant evidence to convict even if this section of the statute did not exist.

*Appeal dismissed without costs,
(WEATHERBE, J., dissenting).*

Note: *Liquor license law—Statutory presumptions.*

In Ontario the statutory presumption against the occupant of premises where the illegal sale of liquor takes place is a conclusive and not a rebuttable one. By sec. 112 of the Ontario Liquor License Act, R.S.O. 1897, c. 245, it is enacted that:—The occupant of any house, shop, room or other place in which any sale, barter or traffic of spirituous, fermented or manufactured liquors, or any matter, act or thing in contravention of any of the provisions of this Act, has taken place, shall be personally liable to the penalty and punishments prescribed by this Act, notwithstanding such sale, barter or traffic be made by some other person, who cannot be proved to have so acted under or by the directions of such occupant, and proof of the fact of such sale, barter or traffic, or other act, matter or thing, by any person in the employ of such occupant, or who is suffered to be or remain in or upon the premises of such occupant, or to act in any way for such occupant, shall be conclusive evidence that such sale, barter, or traffic, or other act, matter or thing, took place with the authority of and by the direction of such occupant.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, AND
GARROW, JJ.A.

THE KING v. HANRAHAN.

Common betting-house—Offence of keeping—Horse racing—Race meeting of an incorporated association—Exemption as to betting inapplicable to offence of keeping betting-house—Cr. Code secs. 197, 198, 204.

1. The exemption contained in Code sec. 204 (2) as to bets made on the racecourse of an incorporated association during a race meeting is not to be read into secs. 197 and 198 as to the offence of keeping a common betting-house.
2. It is an offence under the Criminal Code to keep a common betting-house whether or not it is kept on the racecourse of an incorporated association, and is operated only during the actual progress of a race meeting.

ARGUED: April 18, 1902.

DECIDED: May 8, 1902.

Case stated for the opinion of the Court of Appeal pursuant to leave granted.

The facts and stated case appear in the judgment of OSLER, J.A.

The following are the sections of the Criminal Code material to the case:—

197. COMMON BETTING-HOUSE DEFINED.—A common betting-house is a house, office, room or other place—

(a) opened, kept or used for the purpose of betting between persons resorting thereto and—

(i.) the owner, occupier, or keeper thereof;

(ii.) any person using the same;

(iii.) any person procured or employed by, or acting for or on behalf of any such person;

(iv.) any person having the care or management, or in any manner conducting the business thereof; or

(b.) opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration,

(i.) for any assurance or undertaking, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game or sport; or

(ii.) for securing the payment or giving by some other person of any money or valuable thing on any such event or contingency; or

(c.) opened, or kept for the purpose of recording or registering bets upon any contingency or event, horse race or other race, fight, game or sport, or for the purpose of receiving money or other things of value to be transmitted for the purpose of being wagered upon any such contingency or event, horse race or other race, fight, sport or game, whether any such bet is recorded or registered there, or any money or other thing of value is there received to be so transmitted or not; or

(d.) opened, kept or used for the purpose of facilitating, or encouraging or assisting in, the making of bets upon any contingency or event, horse race or other race, fight, game or sport, by announcing the betting upon, or announcing or

displaying the results of, horse races or other races, fights, games or sports, or in any other manner, whether such contingency or event, horse race or other race, fight, game or sport, occurs or takes place in Canada or elsewhere.

198.—KEEPING DISORDERLY HOUSE.—Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as hereinbefore defined.

2. Any one who appears, acts, or behaves as master or mistress, or as the person having the care, government or management, of any disorderly house shall be deemed to be the keeper thereof, and shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof.

204. BETTING AND POOL-SELLING.—Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding one thousand dollars, who—

(a.) uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool; or

(b.) keeps, exhibits, or employs, or knowingly allows to be kept, exhibited or employed, in any part of any premises under his control, any device or apparatus for the purpose of recording any bet or wager or selling any pool; or

(c.) becomes the custodian or depositary of any money, property or valuable thing staked, wagered or pledged; or

(d.) records or registers any bet or wager, or sells any pool, upon the result—

(i.) of any political or municipal election;

(ii.) of any race;

(iii.) of any contest or trial of skill or endurance of man or beast.

2. The provisions of this section shall not extend to any person by reason of his becoming the custodian or depositary

of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals or made on the racecourse of any incorporated association during the actual progress of a race meeting. R.S.C. c. 159, s. 9.

TORONTO, April 18, 1902.

E. F. B. Johnston, K.C., for the defendant. The magistrate has found that races were going on in two places—on the track where the house or club was, and at Morris Park in New York State—and that persons in the club were betting on both races. The conviction was made under secs. 197 and 198 of the Code, but those sections must be read with sec. 204, which makes the betting on the local races lawful; and so betting on the other races at the same time and place would be no offence. Section 197 creates no offence in respect to betting, but relates merely to *keeping* the house, and only defines, but imposes no penalty. If the accused comes within sec. 204, he does not keep a common betting house. The general sweeping effect of sec. 197 is not extended to the betting on the local races, which is protected by sec. 204. Where a statute is silent as to time and place, the Court will not supply the defect in the case of a crime: *The Queen v. Brown* (1894), 64 L.J. Mag. Cas. 1 at p. 7. Betting is no offence, except where made so by statute. The place is the evil aimed at. This race-course is reserved by sec. 204 as a place where betting may be carried on, and to constitute a gaming-house the betting must be illegal. Sec. 204 makes the betting here complained of lawful. To do a lawful act does not make the place where it is done an unlawful place: *Stratford Turf Association v. Fitch* (1897), 28 O.R. 579; *Powell v. The Kempton Park Race-course Co. Ltd.*, [1899] A.C. 143. I refer also to *Regina v. Smiley* (1892), 22 O.R. 686.

John R. Cartwright, K.C., Deputy Attorney General, and *Frank Ford*, for the Crown. Section 204 stands by itself and

does not deal with keeping a common betting house; and the provision in sub-sec. 2 is limited to the first part of the section. The Legislature never intended that betting on races all over the world would be protected under that section. The place was used for the purpose of betting; persons resorted there for that purpose, and betting took place with the keeper (the accused) and his assistants, and this case is covered by sec. 197. The statute should receive a liberal construction: *Walsh v. Trebilcock* (1894), 23 S.C.R. 695 at p. 706. We also refer to *The Queen v. Cook* (1884), 13 Q.B.D. 377 at p. 382 *et seq.*; *Jenks v. Turpin* (1884), 13 Q.B.D. 505.

Johnston, in reply. If sec. 204 does not apply to sec. 197 a person who did a legal act might be punished under sec. 197.

TORONTO, May 8, 1902.

ARMOUR, C.J.O.:—The conviction is in my opinion valid and should be affirmed.

There is nothing in the Criminal Code which, under any circumstance of time or place, exempts from liability the keeper of a common betting house.

The law prohibits the keeping of a common betting house on the race-course of an incorporated association, just as much as it prohibits the keeping of it elsewhere, and prohibits the keeping of it there, just as much during the actual progress of a race meeting as at any other time.

And there is nothing in sec. 204 of the Criminal Code which warrants an implication that a common betting house may be kept on the race-course of an incorporated association during the actual progress of a race meeting: see *Walsh v. Trebilcock*, 23 S.C.R. 695.

OSLER, J.A.:—Case stated by the police magistrate at Windsor, under sec. 744 of the Criminal Code, 1892. The defendant was tried on the 10th May, 1901, upon an information laid before the police magistrate, charging that he did on the 6th May, 1901, unlawfully keep a disorderly house, that is

to say, a common betting house, contrary to the form of the statute in such case made and provided, and he was found guilty and convicted of the said offence.

The convicting magistrate reported that it was shewn before him, that at the time and place stated in the information, a house was kept and used for the purpose of betting between persons resorting thereto and the keeper thereof, and that the said Edward Hanrahan appeared to be the person having the management of the said house, and he found him to be the keeper thereof.

That the house was owned by a joint stock company called "The Essex Racing and Athletic Club," of which the said Edward Hanrahan was president, and was situate on the race track of the Windsor Driving Park, a duly incorporated association.

That on the date stated in the information, there were between 150 and 200 people at the said betting house, and about 30 of them were betting with the said Edward Hanrahan and his assistants, some upon horse races, then in progress at Morris Park in the State of New York, with which there was telegraph communication, and others upon horse races, then in progress on the said local race track, which latter races were being conducted by the Essex Racing and Athletic Club under agreement with the said association.

The magistrate further reported, that on the above facts he convicted the said Edward Hanrahan under secs. 197 and 198 of the Criminal Code, 1892, and the conviction having been questioned, on the ground, that it was erroneous in point of law, he submitted to the Court of Appeal the question, whether upon the facts so found the conviction was right. If the Court was of opinion that the conviction was erroneous in point of law the same was to be quashed, otherwise to stand.

The case comes before us under secs. 743 and 744 of the Code, leave to appeal having been granted, and a case stated for the opinion of the Court, as if the question had been reserved by the magistrate. The facts have been found by him,

and we have only to determine whether or not, upon the facts so found, the conviction is erroneous in point of law.

The offence charged is one which may be tried summarily before a police magistrate under secs. 782, 783 (*f*) of the Code.

Section 198. of the Criminal Code, 1892, enacts that: "Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any . . . common betting house," as defined by sec. 197, and—(sub-sec. 2)—that "anyone who appears, acts, or behaves as the person having the care, government or management, of any disorderly house . . . shall be liable to be prosecuted and punished as such, although in fact he or she is not the real owner or keeper thereof."

By sec. 197 a common betting house is defined as (*inter alia*) a house, office, room or place (*a*) opened, kept or used for the purpose of betting between persons resorting thereto and

- (i.) the owner, occupier, or keeper thereof ;
- (ii.) any person using the same ;
- (iii.) any person procured or employed by, or acting for, or on behalf of any such person ;
- (iv.) any person having the care or management, or in any manner conducting the business thereof.

It is unnecessary to set forth the other clauses of the section as the defendant is convicted of an infraction of clause (*a*), that is to say, of keeping a disorderly house, *i.e.*, a common betting house.

The only question is whether the magistrate could properly hold upon the facts that the house in question was a common betting house, for if it was, it was a disorderly house and the defendant was properly convicted. The house was owned by a joint stock company, but the defendant was found to be the keeper of the house, and it was found that the house was kept and used at the time and place, charged in the information, for the purpose of betting between persons resorting thereto and the keeper thereof; and it was also found that there were a number of persons betting with

the accused and his assistants, some of them, upon horse races then in progress in Morris Park in the State of New York, and others, upon horse races then in progress upon a local race track, which latter were being conducted by the Essex Racing and Athletic Club.

What is struck at by secs. 197 and 198 is the keeping of a common betting house for any of the purposes mentioned in clauses (a), (b), (c),* and (d)* of sec. 197.

The first clause (a) deals with the keeping of such a house for the purpose of betting in any manner, between the persons resorting thereto and the different classes of persons specified in items (i.) (ii.) (iii.) and (iv.) of that clause as owners, keepers, managers, etc., thereof.

The other clauses define other purposes, connected with betting, which, if a house is kept therefor, will also constitute it a common betting house and therefore a disorderly house, but with these we are not concerned, as the conviction does not proceed upon them.

I only note them, in order to emphasize the fact that the offence dealt with by the whole section is the *keeping* of a house, office, room or other place *for the proscribed purposes*. This being so, the facts found bring the defendant clearly within its danger and he was rightly convicted.

It was strongly urged on his behalf, that he had done nothing, but what is permitted by sub-sec. (2) of sec. 204 of the Act. That section, however, whatever may be its scope, and whether some of the acts forbidden by it might be evidence of an offence under sec. 197 or not, stands by itself. It is enough to say, that the exception contained in sub-sec. (2) is expressly limited to the first part of the section, and there is no ground for reading it into sec. 197.

The conviction must be affirmed.

MACLENNAN, MOSS, and GARROW, JJ.A., concurred.

Conviction affirmed.

*Added to sec. 197 of the Code by 58 & 59 Vict. ch. 40 (Can.).

[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE IRVING, J.

THE KING v. JORDAN.

Appeal from summary conviction—Notice of appeal—Form and service of—Recognizance or deposit as security for costs on appeal—Appellant not taken into custody—Medical Act (B.C.) 1898—Summary Convictions Act, R.S.B.C. 1897, ch. 176, sec. 71—Cr. Code secs. 879, 880.

1. A notice of appeal under the British Columbia Summary Convictions Act is sufficient if addressed to the convicting magistrate only and served on him only.
2. The recognizance or deposit required to be given or made on appealing from a summary conviction under that statute (similar to Cr. Code sec. 880 (c)) is not invalid because the appellant was not first taken into custody.
3. The notice of appeal need not recite that the appellant is a "person aggrieved" by the decision appealed from (see Code sec. 879).

DECIDED: February 15, 1902.

Summons by prosecutors that Henderson, Co. J., be prohibited from taking any further proceedings in an appeal from a summary conviction whereby Jordan on 20th January, 1902, was convicted of an offence under the British Columbia Medical Act, and fined \$50.00, and in default of payment distress was to be levied, and in default of distress he was to be imprisoned for thirty days. On January 24th, Jordan deposited with the Magistrate the amount of the fine and \$50.00 for security for costs. The remaining facts appear fully in the judgment.

L. J. McPhillips, K.C., for the summons: Notice of appeal should have been addressed to and served on the prosecutors. Appeal is not a matter of right but a special provision. He cited *Paley on convictions*, 7th Ed., 282-292; *Reg. v. Keepers of Peace and Justice of County of London* (1890), 25 Q.B.D. 360; *The King v. Hanson* (1821), 4 B. & Ald. 519; *Reg. v. Gray* (1900), 5 Can. Cr. Cas. 24; *Cooksley v. Nakashiba* (1901), 5 Can.

Cr. Cas. 111, 8 B.C.R. 117; *The King v. The Justices of Essex* (1826), 5 B. & C. 431; *The King v. The Justices of the West Riding of Yorkshire* (1828), 7 B. & C. 678; *Keohan v. Cook* (1887), 1 N.-W.T. Rep. 125; *Cragg v. Lamarsh* (1898), 4 Can. Cr. Cas. 246; *Ex parte Curtis* (1877), 3 Q.B.D. 13. If notice is served on the Magistrate for the prosecutor it must shew on its face that it was served on the Magistrate for the prosecutor—and a verbal statement to this effect is insufficient; *Canadian Society v. Lauzon* (1899), 4 Can. Cr. Cas. 354 and *Hostetter v. Thomas* (1899), 5 Can. Cr. Cas. 10. A proper form of notice is in Searger's Magistrates' Manual, p. 69. Security was not given in time. He referred to sections 67 and 71 of the Medical Act 1898; Beal's Interpretation, 177. As to right to prohibition he referred to *Farquharson v. Morgan* (1894), 1 Q.B. 552 at p. 556; *Sherwood v. Cline* (1888), 17 Ont. R. 30 at pp. 37 and 39; Short on Quo Warranto, at p. 461, and *In re Brazill v. Johns* (1893), 24 Ont. R. 209 at p. 215.

Bowser, K.C., contra: The forms of notice under the Criminal Code and the Provincial Summary Convictions Act are different, the Code form assuming that both Justice and respondent should receive notice whereas our form is addressed to the Justice and his name also appears in the body of the form. The informant is not a party to the record and therefore not entitled to notice. He referred to *Ex parte Doherty* (1885), 25 N.B.R. 38; *Reg. v. Justices of Essex* (1892), 1 Q.B. 490; *Gemmell v. Garland* (1886), 12 Ont. R. 142; *Reg. v. The Justices of Denbighshire* (1841), 9 Dowl. P.C. 509; *Jones v. Grace* (1889), 17 Ont. R. 681; *Green v. Hunt* (1882), 51 L.J. Q.B. 640; *Truax v. Dixon* (1889), 17 Ont. R. 366 at p. 375; *The Queen v. Fitzgerald* (1898), 1 Can. Cr. Cas. 420 and *Re Kwong Wo* (1893), 2 B.C.R. 336.

McPhillips, in reply; *Reg. v. Justices of Essex* (1892), 1 Q.B. 490 is based on a statute different from ours and *Ex parte Doherty* (1885), 25 N.B.R. 38 is against English and Canadian authorities.

VICTORIA, B.C., February 15, 1902.

IRVING, J.: On the 20th January, one Jordan, was convicted by the Police Magistrate at Vancouver of an offence against the provisions of the British Columbia Medical Act of 1898.

On the 25th of January, Jordan gave notice of his intention to appeal, addressing it to "J. A. Russell of the City of Vancouver, Police Magistrate." This notice was served upon Mr. Russell and also upon the solicitors for the informant.

When the matter came up before the County Court Judge Mr. McPhillips objected to the appeal being heard on the following grounds:

(1.) That the notice of appeal was insufficient inasmuch as it was addressed only to the convicting Magistrate and not to the prosecutor; (2.) That the security had not been furnished within the time stipulated by the said Acts as the respondent did not furnish security before being released from custody.

The learned Judge overruled these objections and proceeded to hear the appeal.

The present application is for an order that His Honour Judge Henderson be prohibited from taking any further proceedings in the appeal.

By section 71 of the Summary Convictions Act (B.C.), it is provided that the right of appeal shall be subject to the following conditions: (a) (which I need not now refer to); (b) "the appellant shall give to the respondent, or to the convicting Justice for him, a notice in writing (R) of such appeal, within ten days after such conviction." The form (R) given in the schedule is as follows: [Setting it out.]

In support of his first objection Mr. McPhillips cites three decisions in the North-West Territories. In *Keohan v. Cook* (1887), 1 N.-W. T. Rep. 125—a notice of appeal addressed to the Magistrate only—and not served upon the informant, was held bad. This was an appeal under the Summary Convictions Act. R.S.C. 1886, Cap. 178, sec. 77.

The principle of that decision was extended in *Cragg v. Lamarsh* (1898), 4 Can. Cr. Cas. 246, where the notice of appeal was not addressed to any person, and the Judges held that the notice was insufficient.

In *Ex parte Curtis* (1877), 3 Q.B.D. 13, a notice to the Justices generally, and not to the individual Justices, who sat in the case, was held bad. In *Hostetter v. Thomas* (1899), 5 Can. Cr. Cas., a notice of appeal addressed to one only of the two convicting Justices was held insufficient. None of these cases are exactly like the case now under consideration.

On the other hand, in *Ex parte Doherty*, 25 N.B.R. 38, decided in 1885 by the Supreme Court of New Brunswick, a notice directed to and served upon the Magistrate was held sufficient under section 66 of the Dominion Statute 32 & 33 Vict., Cap. 31.

The form of the notice of appeal given by the schedule is very tricky. The Act says notice must be given to the "respondent or (apparently in substitution for the respondent) the convicting Justice for him."

The form, however, is addressed to the Justice by name "C. D." and contains a direction that the notice shall contain the names and additions of those to whom the notice is required (*i.e.*, by the Act) to be given—that is to say the Act prescribes that the appeal shall be given to one person or a substitute; the form says the notice must be addressed to the substitute and adds a direction which may be read in two ways either (*a.*) that the notice shall be given to the respondent or the substitute, or (*b.*) that it shall be given to the substitute and also to the respondent.

This is purely a technical objection and I feel sure that the omission to add the respondent's name to this notice was not calculated to mislead; see section 10, sub-section 38 of the Interpretation Act.

The decision *Ex parte Doherty* seems to me right and more consistent with the views expressed by the late Mr. Justice Gwynne in *Reg. v. Nichol et al* (1876), 40 U.C.Q.B. 76 at p. 79,

"we must read these notices, not with a critical eye, but literally *ut res magis valeat*, and so as to uphold, not to defeat, the right of appeal given to parties summarily convicted," and I think between the conflicting decisions, I ought to be guided by the decision of the Supreme Court of New Brunswick in this matter, particularly so, when so eminent a Judge as the late Mr. Justice King assented to the decision.

In this connection I would again call attention to the 38th sub-section of the Interpretation Act—"where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them." This sub-section in my opinion makes clear the grounds of the distinction between the English cases and the decision of Gwynne, J.

I am not at all satisfied that the service on the solicitors for the informant was not sufficient (see Short & Mellor p. 476), although it is not necessary to decide that point.

Another point taken before me was, that the notice did not state that Jordan was the "person aggrieved;" the Act does not, nor does the form in the schedule, require that to be alleged. It would be quite superfluous to state that fact, as the man does say that he was convicted and fined \$50.00. The inference that he is the person aggrieved is plain.

As to the second ground taken before the Magistrate, that the security had not been furnished by the respondent before being released from custody. As a matter of fact the man was not taken into custody, how it can be argued that he is to lose his right to appeal because no one would take him into custody, is something I cannot understand.

The order will be refused with costs.

Prohibition refused.

Note: *Regularity of the notice of appeal from a summary conviction.*

Sec. 71 of the B.C. Summary Convictions Act, R.S.B.C. ch. 176, under which the appeal was taken in the Jordan case, *supra*, contains the following provisions:—(b) The appellant shall give to the respondent, or to the convicting justice for him, a notice in writing (R) of such appeal, within ten days after such conviction or order.

Note:—Continued.

(c) The appellant shall either *remain in custody* until the holding of the court to which the appeal is given, or shall enter into a recognizance (5) with two sufficient sureties, before a justice, conditioned personally to appear at the said court and to try such appeal and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court; or, if the appeal is against any conviction or order whereby only a penalty or sum of money is adjudged to be paid, the appellant (although the order directs imprisonment in default of payment), instead of *remaining in custody* as aforesaid or giving such recognizance as aforesaid, may deposit with the justice convicting or making the order such sum of money as such justice deems sufficient to cover the sum so adjudged to be paid, together with the cost of the conviction or order, and the costs of the appeal; and upon such recognizance being given or such deposit being made, the justice before whom such recognizance is entered into or deposit made shall *liberate such person if in custody*.

These provisions, it will be seen, are similar to those contained in the Criminal Code of Canada, sec. 880.

Sec. 102 of the British Columbia statute enacts (similarly to the Criminal Code) that the several forms in the schedule thereof, varied to suit the case, or forms to the like effect shall be deemed good, valid and sufficient in law.

The statutory Form R contained in the schedule of the B.C. Summary Convictions Act is as follows:—

Notice of Appeal against a Conviction or Order.

“To C.D., of, &c., and — [the names and additions of the parties to whom the notice of appeal is required to be given.]

Take notice that I, the undersigned A.B., of — intend to enter and prosecute an appeal at the next sittings of the County Court of —, to be holden at —, against a certain conviction (or order) bearing date on or about the — day of — instant, and made by (you), C.D., Esquire, a justice of the peace in and for the said — (or county, united counties, or as the case may be), of — whereby the said A.B., was convicted of having (or was ordered to pay) [here state the offence as in the conviction, information, or summons, or the amount adjudged to be paid as in the order, as correctly as possible.]

Dated this — day of —, 18—.

A.B.”

In *Ex. p. Doherty* (1885), 25 N.B.R. 38, there were two questions raised before the Supreme Court of New Brunswick, *en banc*, one as to the regularity of the notice of appeal, and the other as to the regularity of the entry of the appeal, which was taken under the provisions of the Dominion statute, 33 Vict. ch. 27. The notice was directed to and served upon the magistrate. Counsel in support of the objection contended that it should have appeared on the face of the notice that it was for the prosecutor. King, J., said, “I think the notice should be addressed to the

Note:—Continued.

informant, but it may be handed to the magistrate." Wetmore, J., said, "The words of the form provided by the statute are 'conviction made by *you*,' shewing that it may be also addressed to the magistrate. Allen, C.J., said, "I think the applicant did all that was necessary to perfect his right of appeal when he gave the notice of appeal to the police magistrate and entered into the recognizance required by the Act, 33 Vict., ch. 27. The second sub-section of that Act directs that a person intending to appeal from a conviction or order of a justice shall give to the prosecutor or complainant, or to the convicting justice or one of the convicting justices, for him, a notice in writing of such appeal within four days, &c. . . . The notice of appeal in this case was given to the police magistrate, and it correctly describes the conviction against which the party intended to appeal. But it is contended that the notice should have stated on its face that it was given to him for the prosecutor. I do not think this was necessary. The Act having stated that the notice might be given to the convicting justice for the prosecutor, the justice must be taken to know for what purpose it was given to him; and the form of the notice prescribed by the Act allows of such variations as are necessary to meet such a case." Wetmore, Palmer, Fraser and Tuck, JJ., concurred with Allen, C.J., and a rule absolute for a mandamus to compel the hearing of the appeal was issued. King, J., delivered the following opinion:—"My only doubt is whether the notice is within the statute; but I do not dissent."

The form of notice of appeal provided by the Dominion statute of 1870, 33 Vict. (Can.), ch. 27, is in practically the same terms as the form in the B.C. Summary Convictions Act, and is similarly addressed to "C.D., of, &c., and ——" and contains the similar reference to the conviction as having been "made by (you) C.D., Esquire, (one) of Her Majesty's justices of the peace for the said district," etc. See also the repealed Summary Convictions Act, R.S.C. 1886, ch. 178, form R.

It may be observed that although the initials used in the body of the notice, under the Dominion Statute of 1870 and the Summary Convictions Act, R.S.C. ch. 178, and also under the B.C. Summary Convictions Act, to designate the magistrate, are identical with the initials of the first party to whom the notice is addressed, that the notice of appeal under the Criminal Code notice is addressed, that the notice of appeal under the Criminal Code, sec. 880 (Code form NNN), while similarly addressed to "C.D. and ——" refers to the conviction as "made by (you) J.S., Esquire, a justice of the peace," etc. The safer course therefore in an appeal under the Code is to address the notice both to the respondent and to the magistrate, whether service is effected on the one or the other.

In a recent British Columbia case, *R. v. Jack* (1902), 5 Can. Cr. Cas. 160, it was held by Bole, Co.J., that a notice of appeal served on the magistrates only is not invalid because not addressed, but the correctness of that decision may be doubted. See note *ante*, p. 161.

[COURT OF KING'S BENCH, QUEBEC.]

APPEAL SIDE.

DISTRICT OF MONTREAL.

BEFORE BLANCHET, HALL, WÜRTELE AND OUIMET, JJ., AND
TELLIER, JUDGE AD HOC.

BRYCE V. WILKS.

Insolvency—Fraudulent concealment of property—Abandonment for benefit of creditors—Discrepancy in statements of affairs issued by insolvent—Presumptions—Quasi-criminal proceedings under provincial law—Application of rules of criminal evidence—Quebec Code of Civil Procedure, Art. 885, 888.

1. In a proceeding of a penal nature involving deprivation of liberty, and brought under a provincial statute for an alleged concealment of property in fraud of creditors, the rules and principles of the criminal law as to the evidence and its effect are applicable, and there must be clear and conclusive evidence to justify a conviction.
2. A finding that an insolvent has secreted a part of his property with the intent of defrauding his creditors is not supported by evidence merely of a discrepancy between two financial statements made by him a few months apart, and the failure of the insolvent to account for the deficit in his affairs other than as being the result of an extravagant expenditure of capital in living expenses.

MONTREAL, June 21, 1902.

The judgment of the majority of the Court was delivered
by

WÜRTELE, J.:—In the year 1900 the appellant and one Douglass carried on in partnership a business in the city of Montreal for the sale of type-writing machines, and as their business was not prosperous they had to make an abandonment of their property for the benefit of their creditors. On the 28th July, 1900, Henry Upton made an agreement with the appellant by which he undertook to lend \$3000 on interest to him, to enable him to buy the stock, book-debts and other assets of the insolvent firm and continue its business under the style of the Albert Bryce Company. It was, moreover, agreed

that Mr. Upton should act as the appellant's bookkeeper at a salary, and that he should control the financial part of the business. Mr. Upton advanced the money, and acted for some time as the bookkeeper of the new concern.

On the 31st December, 1900, Mr. Upton prepared a statement which he professed shewed the state of the business. This statement represented the assets and liabilities to be as follows:—

ASSETS.

Goods on hand.....	\$2,883.06
Furnitures and fixtures.....	151.59
Accounts collectable.....	1,134.06
Cash on hand and in bank.....	107.92
	<hr/>
	\$4,276.63

LIABILITIES.

Amount due to Mr. Upton.....	\$3,049.00
	<hr/>

According to this statement there was a
surplus of..... \$1,227.63

At that time, however, Mr. Upton was desirous of forming a joint stock company and of transferring the business to it, and in order to make it appear in as favourable a light as possible, he increased the value placed by the appellant when he took the stock on some of the goods, and included in the item of accounts collectable the doubtful and bad debts as well as the good ones.

The appellant and Mr. Upton having disagreed, Mr. Upton discontinued to act as the bookkeeper of the concern, and some time afterwards he made a demand of abandonment on the appellant, but this demand was dismissed. Later on Mr. Upton made a second demand, and on the 26th July, 1901, the appellant made an abandonment of his property, and in the statement which he produced he gave his assets and liabilities as follows:—

ASSETS.

Type-writers and supplies	\$1,330.53
Office furniture, stationery, and repair department	268.76
Book-debts	283.70
	<hr/>
	\$1,882.99

LIABILITIES.

.....	\$3,732.84
	<hr/>

This gave a deficit of \$1,849.85
as against a surplus of \$1,227.63 according to Mr. Upton's
statement of the 31st December, 1900, making a difference
between the two statements of \$3,077.48 as to the position of
the business.

Messrs. Wilks and Michaud were appointed curators, and as
such, under the authorization of the inspectors, they contested
the statement filed by the appellant, and charged him in the
first place with having fraudulently omitted to mention in his
statement property of over the value of \$100, and secondly,
with having within the year immediately preceding the filing
of his statement, secreted some of his property with intent to
defraud his creditors.

This contestation was made under the provisions of Article
885 of the Code of Civil Procedure, and in the event of any
one of the offences specified in this article being established, the
debtor was liable, under the provisions of Article 888, to an
imprisonment for a term not exceeding one year.

The judgment of the Superior Court, which was rendered
on the 18th February, 1902, and which is appealed from,
declares that during the time in which the appellant carried on
business he had absorbed the \$3000 which had been obtained
from Mr. Upton and placed in the business, and had not
rendered any satisfactory account of the deficit which existed;
that it resulted from this proof that he had secreted a part of
his property with the intent of defrauding his creditors, and

that the contestation was well founded, and condemned the appellant to an imprisonment of two months and the payment of the costs of the contestation.

The proceeding which was taken against the appellant by the respondent is of a penal nature, and it was decided by this Court in the case of *Sylvestre v. Letang* (8 R.J.Q. Q.B., p. 389) that the same rules as in a criminal case with respect to the sufficiency of its allegations therefore applied to a contestation containing charges under Article 885 of the Code of Civil Procedure of fraudulent omissions and of fraudulent misstatements in a statement or of fraudulent secretion. The same rule applies in such cases to the evidence adduced and to its effect. In criminal law, whoever desires a court to give judgment as to any liability dependent on the existence of facts which he asserts to exist, must prove that they do exist, and the prosecutor must shew that the accused is guilty of the offence charged, and its commission must be proved beyond reasonable doubt. The jury or the magistrate or judge, in order to convict, must be satisfied from the evidence adduced, beyond a reasonable doubt, that the accused is guilty in the manner and form charged in the indictment or information.

Now, in this case, has evidence been given which would satisfy a jury and justify the jurors in finding the appellant guilty of the charge brought against him, or which would warrant a magistrate or a judge to convict him ?

The judgment finding the appellant guilty is founded upon the discrepancy between the statement made by Mr. Upton and accepted as correct by the appellant, and the statement filed by him with his abandonment; but this is mere presumption, subject to be contradicted by express testimony.

Mr. Michaud, one of the curators; Mr. Upton, one of the inspectors; and Miss Pearson, who had been the appellant's bookkeeper after Mr. Upton discontinued to act, were examined as witnesses on behalf of the contestants. Mr. Michaud, in cross-examination, states that he did not know that the appellant had secreted any of his things, and that he never heard

that the appellant had done so. Miss Pearson, also in cross-examination, says that she never knew that the appellant had taken anything out of the stock for the purpose of secreting it, and that she had never heard of any such thing. Mr. Upton commenced by stating that nine machines were not in the goods on hand according to the stock-book, although he was not positive as to the number; but, on cross-examination, he admitted that he had found machines entered in the sales-book which had not been entered in the stock-book, and that there were enough to account for those which were not entered in the stock-book; he added that he did not know that the appellant had secreted any machines, but that, according to his view, there were machines not accounted for. He also said that the appellant had exceeded his allowance for living expenses by a considerable amount.

The appellant was also examined as a witness for the respondents, and he attributed the difference between the statement made by Mr. Upton and the statement filed by him with his abandonment to the exaggerated values placed in the first mentioned statement on the stock and book debts, to the heavy expenses incurred in carrying on the business and to his living expenses. He also swore positively that he had never secreted any of his effects.

A presumption is a probable conclusion or inference, drawn from certain incidents which are proved, but such incidents should exclude a rational probability of innocence. In this case does the discrepancy between the statements indicate beyond reasonable doubt the charges of omission and secretion and exclude the probability of innocence? The majority of the Court does not think so.

If the charge against the appellant was that he had been a bad administrator, that he had not carried on his business in a profitable and proper manner, that he did not keep the books of his business regularly and carefully and so as to shew the state of his affairs, and that he was extravagant in his mode of living and had culpably sunk his capital in such living expenses

to the detriment of his creditors, the discrepancy between the two statements would have raised a reasonable presumption of guilt and we would unhesitatingly have found him guilty of that charge ; but that is not the charge laid against him. The charge is of having omitted some of his effects from his statement and of having secreted others.

Clear and undoubted proof of the charge of secretion has not been made, and the presumption is insufficient, and besides, it has been rebutted. No sufficient evidence exists, therefore, on which the accused can be found guilty.

With respect to the other charge made against the appellant of having omitted to enter some property belonging to him in his statement, it appears that the only property which he omitted was his household furniture, and he explained that he did so because he thought that he and his wife were separated as to property, and that it belonged to her, that he never secreted it, and that he afterwards offered to deliver it to the curator, who said that they would lay the matter before the inspectors.

It seems to the majority of the Court that if there could be a presumption of fraudulent secretion from the discrepancy in the statements, there is evidence to contradict such presumption and to nullify and destroy it, and that a jury or a magistrate or judge in a criminal case would, in the absence of the clear and positive proof of guilt required, be justified in acquitting the appellant on the charge of fraudulent secretion, and in the face of the explanation why the household furniture was not included in the statement a jury or a magistrate or judge in a criminal case would not be justified in finding that the omission was made by the appellant with intent to defraud his creditors. No judge on the case as stated could or would suggest a verdict of guilty. To subject a British subject to imprisonment and deprive him of his liberty requires clear and conclusive evidence of guilt, and he should not be convicted when there is a reasonable doubt of his guilt.

The majority of the Court is of opinion that there is no sufficient evidence to support the two charges, and that the judgment condemning the appellant to an imprisonment and to the payment of the costs of the contestation of his statement is unfounded.

The appeal is, therefore, maintained, with costs; the judgment appealed from is set aside and annulled, and the contestation of the statement is dismissed, with costs.

The formal judgment was drawn up as follows:—

“ The Court, after having heard the parties by their respective counsel, examined the record and maturely deliberated:—

Whereas the appellant, on the 26th day of July, 1901, made an abandonment of his property for the benefit of his creditors and deposited with the declaration of the abandonment a statement of his assets and debts as required by Article 861 of the Code of Civil Procedure, shewing the value of his assets to amount to the sum of \$1,882.99, and the amount of his debts to be \$3,732.84, and giving a deficit of \$1,849.85 ;

Whereas the respondents, as curators for the abandonment and as such duly authorized by the inspectors, contested the statement deposited and filed by the appellant and charged him under the provisions of Article 885 of the Code of Civil Procedure in the first place with having fraudulently omitted to mention in the statement property belonging to him exceeding in value \$100, and secondly, with having within the year immediately preceding the filing of the statement secreted some of his property with intent to defraud his creditors ;

Whereas about six months before the abandonment a statement of the appellant's business had been prepared, as on the 31st day of December, 1900, which represented his assets to amount in value to the sum of \$4,276.63, and his liabilities to be \$3,049, and shewed a surplus of \$1,227.63;

Whereas by the judgment appealed from it is held that the appellant did not account in a satisfactory manner for the deficit in his affairs and that it resulted from the proof that

during the year immediately preceding the making of his abandonment he had secreted part of his property with intent to defraud his creditors, and the contestation of the appellant's statement is therefore maintained and he is condemned to be imprisoned for the term of two months and to pay the costs incurred on the contestation ;

Whereas by Article 888 of the Code of Civil Procedure a debtor who has made an abandonment is liable, for the commission of any of the offences mentioned in Article 885, to be imprisoned for a term not exceeding one year ;

Considering that proceedings instituted under the provisions of Article 885 are of a penal nature, and that the rules and principles which govern the evidence and its effect in criminal cases apply to charges which are made under the provisions of this article against a debtor who has made an abandonment.

Considering that to justify a conviction or a verdict of guilty, it is necessary, under the rules and principles which prevail in criminal law, that guilt be established by clear and conclusive evidence.

Considering that the discrepancy between the two statements and the absence of a satisfactory explanation of the deficit in his affairs on the part of the appellant, raised a presumption of mismanagement of his business and of extravagance in his living and other expenses, but do not shew conclusively any omission to enter property belonging to him in the statement filed with his declaration of abandonment or any secretion of any part of his property and do not, therefore, establish guilt in an indubitable manner.

Considering, moreover, that any presumption of omission or of secretion which could possibly be raised by the discrepancy between the two statements has been repelled by testimony, and that no clear and conclusive evidence has been adduced to establish that the appellant omitted fraudulently to enter in the statement which has been contested any property belonging to him with the intent to defraud his creditors, and to establish that he had secreted with like intent any part of his property.

Considering that to subject a British subject to imprisonment and to deprive him of his liberty requires clear and conclusive evidence of guilt, and that a conviction under the circumstances of this case was not justifiable, and that there is, therefore, error in the judgment appealed from.

Doth maintain the appeal, with costs in favour of the appellant against the respondents; doth set aside and annul the judgment appealed from, which was rendered by the Superior Court, sitting at Montreal, on the 18th day of February, 1902; and proceeding to pronounce the judgment which should have been rendered doth dismiss the contestation made by the respondents of the statement filed by the appellant, with costs.

The Honourable Justices Blanchet and Hall dissent, being of opinion that the judgment appealed from should be affirmed and the appeal dismissed."

*Appeal allowed, BLANCHET and
HALL, JJ., dissenting.*

[COUNTY COURT OF WESTMINSTER, B.C.]

BEFORE HIS HONOUR W. NORMAN BOLE, COUNTY JUDGE.

SING KEE v. JOHNSTON.

Sunday observance law—Municipal by-law against Sunday trading—Carrying on retail business—Trifling sale—Unreasonably large fine imposed—Review on appeal—Conviction of magistrate reversed and new conviction made with reduced fine.

1. Where an unreasonably large fine has been imposed by a magistrate under a municipal by-law for a trifling offence thereunder, the Court having jurisdiction to re-try the case on appeal may set aside the conviction and re-convict with a lesser penalty.

DECIDED : May 29, 1902.

Appeal by Lee Sing, a Chinaman, against a summary conviction for an infraction of a Sunday observance law for which he was fined \$60 and costs by the police magistrate of New Westminster on a prosecution by the city authorities for selling twenty cents worth of goods on a Sunday.

F. W. Howay, for appellant.

Morrison, K.C., for respondent.

NEW WESTMINSTER, B.C., May 29, 1902.

BOLE, Co.J.:—In this case the appellant was convicted before the city police magistrate for having on Sunday, 23rd June, 1901, carried on business as a retail trader contrary to the Sunday Observance By-law, and fined \$60 and costs, in default three months' imprisonment. The evidence went to shew that on the day in question the defendant, who is a small storekeeper, sold ten cents' worth of peanuts and ten cents' worth of onions.

Mr. Corbould, the magistrate, was called by the appellant, and it appeared from the police court records that out of eight cases of alleged breach of the Sunday by-law which were before the Court, all the defendants were Chinese, the defen-

dant having been twice summoned for the same offence, but the convictions against him were, I gather, in each case set aside by the higher Court, so one cannot help observing that the defendant was, to say the least of it, the subject of very close attention at the hands of the police, and it is passing strange that on the day in question no other person was found infringing the Sunday by-law.

The defendant met the charge fairly and does not deny that he made a sale on a Sunday, a course which is always taken into consideration in all cases short of murder when imposing sentence. This, however, in my opinion, the learned police magistrate failed to do; on the contrary, he imposed an excessive punishment and one out of all just proportion to the offence, which was trivial, the result of which has been that this wretched Chinaman has been compelled in self-defence to appeal, thus incurring heavy costs; as doubtless had a reasonable fine been imposed in the first instance, he would have paid it, and nothing more would have been heard of the matter.

I reverse the conviction. I convict Sing Kee of the offence wherewith he stands charged; I fine him for his said offence the sum of one dollar, without costs, in default of payment within seven days from date hereof, defendant to be imprisoned for twenty-four hours, and I allow each party to the appeal to pay his own costs.

Judgment accordingly.

Note: *B.C. Summary Convictions Act.*

Sec. 76 of the B.C. Summary Convictions Act, R.S.B.C. 1897, ch. 176, as amended by 1901, ch. 54, sec. 3, is as follows:—76 (1) In every case of appeal from any summary conviction or order had or made before any justice, the court to which such appeal is made shall, notwithstanding any defect in such conviction or order and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just, and may, by such order exercise any power which the justice

Note:—Continued.

whose decision is appealed from might have exercised, and such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such justice. The court may also make such order as to costs to be paid by either party as it thinks fit.

(2) Any conviction or order made by the court on appeal may also be enforced by process of the court itself.

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE THE HONORABLE SIR WILLIAM RALPH MEREDITH, C.J. C.P.,
AND MR. JUSTICE LOUNT, SITTING AS A DIVISIONAL COURT.

THE KING v. BENNETT.

Certiorari—Conviction for criminal offence—Costs against prosecutor and magistrate on quashing conviction—Jurisdiction—Distinction between offences under Dominion and provincial laws—False pretences—Cr. Code secs. 358, 754.

1. The High Court in Ontario has no jurisdiction in certiorari proceedings respecting a criminal charge under Dominion laws, to award costs against the prosecutor or the magistrate on quashing the conviction.
2. There is jurisdiction to award costs against an unsuccessful applicant in certiorari proceedings respecting a purely criminal charge either because of the recognizance or of an inherent power of the court.
3. *Semble*, in certiorari proceedings in respect of quasi-criminal prosecutions under Ontario statutes the provisions of the Ontario Judicature Act as to costs are applicable since the passing of the Law Courts Act (Ont.) 1896.

ARGUED: February 20, 1902.

DECIDED: May 14, 1902.

THIS was a motion for an order to quash a conviction of the applicant, made on the 24th June, 1901, by James Lochore, Esquire, a justice of the peace for the district of Algoma, for "obtaining food and lodging under pretence of going to work for the Michigan Land and Lumber Company, Blind River, on the 21st, 22nd, 23rd, and 24th June, A.D. 1901," by which the magistrate adjudged that the applicant should pay a fine of \$10

and \$8.33 costs, and that in default of payment within two hours the applicant should be imprisoned in the common gaol of the district at Sault Ste. Marie for the space of fourteen days, unless these sums and the costs and charges of the commitment and conveying the applicant to the gaol should be sooner paid.

TORONTO, February 20th, 1902.

W. M. Douglas, K.C., for the applicant.

F. Denton, K.C., for the prosecutor.

W. E. Middleton, for the magistrate.

TORONTO, May 14, 1902.

MEREDITH, C.J.:—On the argument of the motion, it was conceded by counsel for the prosecutor and for the magistrate that the conviction must be quashed. The applicant asked for costs against both the prosecutor and the magistrate. They contended that costs should not be given against them, and counsel for the magistrate asked for an order for his protection under sec. 891 of the Criminal Code, 1892.

We are of opinion that this being a proceeding in a criminal matter, the Court has no jurisdiction to give costs against the prosecutor or against the magistrate.

The question as to costs must be determined apart from the provisions of the Judicature Act, which have no application to the practice or procedure in criminal matters (section 191), as indeed they could not, because the power to legislate on that subject is by the British North America Act, 1867, assigned exclusively to the Parliament of Canada.

The practice and procedure in all criminal causes and matters in the High Court, as was pointed out by the present Chief Justice of Ontario in *Regina v. Beemer* (1888), 15 O.R. 267, at p. 270, are to be the same as the practice and procedure in similar causes and matters before the establishment of the

High Court: 46 Vict. ch. 10, sec. 2 (D.), now sec. 754 of the Criminal Code, 1892.

What that practice was is pointed out in *Regina v. Parlby* (1889), W.N. 190; 6 Times L.R. 36; 53 J.P. 774, which shews that the Court had no inherent jurisdiction to award costs against the prosecutor on the making of a rule absolute to remove a conviction by *certiorari*, or a rule absolute to quash a conviction so removed, and that the Court has no statutory authority conferred upon it to do so.

This view has been recognized in numerous cases as correct, and has been acted upon by the Court of Appeal: *London County Council v. Churchwardens and Overseers of West Ham* (2), [1892] 2 Q.B. 173; *Re Fisher*, [1894] 1 Ch. 53, 450; *Regina v. Justices of the County of London and London County Council*, [1894] 1 Q.B. 453; *Regina v. Jones*, [1894] 2 Q.B. 382. See also *Regina v. Lee* (1882), 9 Q.B.D. 394, at p. 396, *per* Field, J.

Two cases are reported in which the English High Court, after the passing of the Judicature Act, gave costs; in one of them against the respondents on making absolute a rule *nisi* to quash in part an order of the quarter sessions: *Regina v. Goodall* (1874), L.R. 9 Q.B. 557; and the other against the magistrate: *Regina v. Meyer* (1875), 1 Q.B.D. 173; but both of these cases were before the decision in *In re Mills, Ex p. Commissioners of Works and Public Buildings* (1886), 34 Ch. D. 24, by which it was settled, contrary to what had been thought by some Judges, that the Judicature Act had not conferred on the High Court any new jurisdiction as to costs.

Regina v. Parlby, according to the report of it in 22 Q.B.D. 520, at p. 528, would seem to be another case of the same class; but the statement made there that the rule was made absolute with costs is erroneous. The subsequent reports of the case, which have been mentioned, shew that the question of costs was not dealt with when the decision of the Court there reported was given, but was subsequently argued, when costs were refused on the ground stated in the subsequent reports.

In this Province costs have been awarded against the prosecutor in several cases. Most of them were decided before *In re Mills, Ex p. Commissioners of Works and Public Buildings*; and in some of them the conviction or order quashed was for a penalty imposed by or under the authority of provincial legislation, to which different considerations apply. at all events since the passing of the Law Courts Act, 1896, 59 Vict. (Ont.) ch. 18, sec. 2, schedule (35), by which the provision which up to that time was contained in the Judicature Acts, by which proceedings on the Crown or Revenue side of the Queen's Bench and Common Pleas Divisions were excluded from the operation of those Acts, was repealed.

If the question to be determined were one of practice only, we should not feel justified in disturbing any settled practice that had been shewn to exist, but as it is not of that character, but, as I have said, one as to the jurisdiction of the Court, and being of opinion that the Court has no jurisdiction to award costs in a criminal matter against the prosecutor, we are bound to disregard that practice and to give effect to that opinion.

Cases in which costs have been given against an unsuccessful applicant for a writ of *certiorari* or to quash are to be distinguished, for in such cases the Court has jurisdiction to give costs against the applicant, either because of the recognizance which he has entered into to pay the costs, or of the inherent power which the Court possesses to give costs as a punishment for erroneously putting the jurisdiction of the Court in motion.

The conviction will, therefore, be quashed without costs, and there will be no order for the protection of the magistrate.

LOUNT, J., concurred.

Conviction quashed without costs.

Note: *Jurisdiction as to costs in certiorari, habeas corpus, and prohibition.*

The following statement of the English practice on the general question of costs on moving absolute a rule nisi for a *certiorari* in a criminal matter, appears in the report of *R. v. Parlbby* (1889), 6 Times L.R. 37:—

Note:—Continued.

“Before the passing of the Judicature Acts and the application of Order LV. (costs), now Order LXV., to all civil proceedings on the Crown side by Order LXII., rule 2, of the Rules of 1880, there were no costs on certiorari to remove orders, or indeed on certiorari at all (Corner’s Crown Practice, 78, 79), because the Court had no original jurisdiction or statutory power to grant any costs on certiorari, and could only discharge a rule nisi for a certiorari with costs by virtue of its inherent jurisdiction to discharge any application with costs, though it might have no jurisdiction to hear the matter itself. *McIntosh v. Lord Advocate*, 2 App. Cas. 41. When, therefore, before the Judicature Act and the Rules of 1880, a writ of certiorari was granted, on the rule nisi being made absolute in respect of an order of justices, it was made absolute without costs. The writ then issued as now, but before it can be allowed, the prosecutor seeking to quash the order is obliged, by 5 Geo. II., c. 19, sec. 2, and Crown Office Rules 1886, rule 33, to enter into a recognizance to pay the costs if he should be defeated—i.e., if the order should be affirmed, and it was therefore by virtue of the recognizance alone, on the order removed being put into the paper on a rule nisi to quash, and not by order of the Court, that he had to pay costs if the order of justices was affirmed. If he succeeded, and if the order was quashed, he could not get his costs, because the court had no original or statutory jurisdiction to grant them. In November, 1880, in *Clark v. Alderbury Union*, 6 Q.B.D. 139, the Court held that an order with case stated upon it removed not by certiorari, but under the Summary Jurisdiction Act. 1879, for the purpose of quashing, being a civil proceeding on the Crown side, the costs—there being none otherwise—were by virtue of the application of Order LV., now LXV., in the discretion of the Court; in effect holding that Order LXV., rule 1, created costs when there were none before. Since that case and *Reg. v. Morris*, 31 W.R. 600, to the time of the decision of *In re Mills Estate*, 34 Ch. Div. 24, in 1886, the Queen’s Bench Division has in certiorari for an order, civil in itself, followed *Clark v. Alderbury Union* and dealt with costs on either side—i.e., from 1880 to 1886, when in *In re Mills* the Court of Appeal held that Order LXV. does not give any jurisdiction to award costs where there were none before the Judicature Acts, but only regulates the mode in which costs are to be dealt with in cases where the Court antecedently had jurisdiction, either original or statutory, to award them. It seems to follow, therefore, that as the Queen’s Bench had no jurisdiction in certiorari, original or statutory to award costs, it cannot do so by virtue of Order LXV., and the matter remains the same as it was before 1880.”

This statement of the law is approved in *London County Council v. Churchwardens*, [1892] 2 Q.B. 173 (C.A.), in which the Court of Appeal held that it had no power to give costs to a successful appellant on an appeal from a judgment of the Queen’s Bench Division (Crown side) given on a special case stated by quarter sessions in respect of an appeal taken to the sessions against a poor-rate.

Note:—Continued.

But the right to grant prohibition to justices of the peace not being a jurisdiction belonging exclusively to the Crown side of the Queen's Bench Division, the High Court in making a rule absolute for a prohibition without pleadings, may make an order for costs. *Reg. v. Justices of the County of London*, [1894] 1 Q.B. 453.

"The High Court in cases of prohibition, which is not a jurisdiction peculiar to the Crown side of the Queen's Bench, has all the jurisdiction as to costs formerly exercised by the Courts of Chancery, Common Pleas and Exchequer; and as these last mentioned courts seem to have had and exercised jurisdiction to give costs against the defendant when granting a prohibition, the High Court now has a like jurisdiction." *Ibid*, per Kay L.J. at p 461.

The same reasoning was held applicable to habeas corpus proceedings in *R. v. Jones*, [1894] 2 Q.B. 382 (Cave and Collins, JJ.), and an order was made for payment by the defendant of the costs of a successful application for the custody of a lunatic patient in an asylum.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, J., IN CHAMBERS.

THE KING V. TREADWELL.

Grievous bodily harm—Conviction and commitment—Describing the offence—Unnecessary to state that act was "unlawfully" done—Cr. Code sec. 242.

1. A conviction for inflicting grievous bodily harm under Code sec. 242 which provides a punishment for the person "who unlawfully wounds or inflicts any grievous bodily harm upon any other person" need not state that the act was done "unlawfully," that term in the section being referable only to the offence of wounding.

ARGUED: January 10, 1902.

DECIDED: January 10, 1902.

Motion in Chambers under Chapter 181 of the Revised Statutes, 1900, "Of Securing the Liberty of the Subject," on the return of a *habeas corpus* for the discharge from custody of Frederick Treadwell, the defendant, a prisoner in the common jail at Halifax, under a warrant of commitment signed by the stipendiary magistrate of the City of Halifax, and reciting a conviction of the prisoner on a trial, with his consent, under part

LV. (section 785 as amended) of "The Criminal Code, 1892," before that officer, for "that he, the said Frederick Treadwell, did in the City of Halifax, on the 25th day of December, A.D., 1901, inflict grievous bodily harm on John Greenfield."

HALIFAX, January 10, 1902.

J. A. Knight, for the Attorney-General of Nova Scotia, took the preliminary objection that *habeas corpus* would not lie to review judicial proceedings of this character, under section 785 of the Criminal Code, citing *The Queen v. Burke*, 1 Can. C. Cas. 539; *Re D. C. Ferguson*, 24 N.S.R. 106.

J. J. Power, for the prisoner, in answer to the objection cited *Rex v. St. Clair*, 27 Ont. A.R. 308; 3 Can. Cr. Cas. 551; *Rex v. Gibson*, 29 O.R. 660; 2 Can. Cr. Cas. 302; *Rex v. Brine*, 33 N.S.R. 43; *Re Sproule*, 12 Can. S.C.R. 205. For the prisoner it was urged that the conviction was bad for omitting the word "unlawfully" before "inflict," and, consequently the commitment and the conviction as recited in the return, disclosed no offence. Code sections 242, 783 (c), 788, 958 and Acts (D.), 1900, ch. 46, sec. 3. *Rex v. Fife*, 17 O.R. 710; *Rex v. Turner*, 1 M.C.C. 239; *Rex v. Ryan*, 2 Moody C.C. 15; *Rex v. Jope*, 3 Allen 161; Paley on Convictions, 7th ed., 180 (n); *Rex v. Clarence*, 22 Q.B.D. 36, 38, 41 and 62; Hawkin's Pleas of the Crown, Book 2, ch 25, sec. 96; Bacon's Abridgement, vol. 4, p. 311; Vol. 27 A. & E. Encyl. Law, p. 696, and vol. 4, p. 752; Hardcastle on Statutes, 3rd ed., p. 151; Vol. 4 of Stephen's Law of England, 1st ed., p. 65; Chitty's Blackstone, vol. 4, p. 205-208; Russell on Crimes, vol. 3, last edition, p. 282.

J. A. Knight, *contra*, cited Code secs. 611 and 982; *Rex v. Crabbe*, 11 U.C.Q.B. 447; 3 W.R. 656; *Rex v. White*, 4 Can. Cr. Cas. 430; *Rex v. Murray*, 1 Can. Cr. Cas. 452.

J. J. Power, in reply, cited *Rex v. Randolph*, 32 O.R. 212; 4 Can. Cr. Cas. 165; Seager's Magistrates' Manual, pp. 46-47; Endlich on Statutes, sec. 71.

HALIFAX, N.S., January 10, 1902.

TOWNSHEND, J.:—The defendant was charged before the stipendiary magistrate of the City of Halifax for “that he, the said Frederick Treadwell, did in the said City of Halifax, on the 25th day of December, A.D., 1901, inflict grievous bodily harm on John Greenfield.”

He consented to be tried on such charge summarily before the magistrate, and was convicted of the alleged offence, and sentenced to pay a fine of thirty dollars, or, in default, to be imprisoned in the county jail for two months. The fine not having been paid, he was committed under the stipendiary’s warrant and is detained for that reason only, as appears from the jailor’s return.

The prisoner has now applied for his discharge under the Liberty of the Subject Act, on the ground that the warrant disclosed on its face no crime or offence for which he could be detained. He was tried and convicted for an offence against section 242 of the Criminal Code. That section is as follows:—“Every one is guilty of an indictable offence, and liable to three years’ imprisonment who unlawfully wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument.” It is contended that the omission of the word “unlawfully” is fatal to the statement of the offence charged—that it is a necessary constituent of the statutable offence. Many cases were cited to shew that where “unlawfully” was used in describing the offence, it must be set out in the conviction: *Regina v. Fife*, 17 Ont. R. 710; but it is to be observed that the words in the section thus construed were “unlawfully and maliciously.” *Rex v. Turner*, 1 Moody C.C. 239, the words were “unlawfully and maliciously.” The same in *Rex v. Ryan*, 2 M.C.C. 15.

In my opinion section 242 of the Code describes two separate offences, that is to say, an “unlawful wounding” and “the infliction of any grievous bodily harm.”

The disjunctive “or” indicates in this connection a purpose

to cover either two separate offences, or, if not, to admit two modes of stating that kind of offence, otherwise the word "unlawfully" would necessarily be repeated before the word "inflict." Again, if not so intended, the word "and," and not "or," would have been used. No doubt, in some sections, this would not be the proper construction, but, in construing the statute regard must be had to the whole subject. I think there is a properly stated offence in the warrant of commitment, and, therefore refuse to discharge the prisoner.

In so deciding it becomes unnecessary to deal with the objection raised by the Crown to the right of the Court to review on *habeas corpus* proceedings the conviction made in the stipendiary's Court on the same ground that such review was refused in *The Queen v. Burke*, 1 Can. Cr. Cas. 539. I express no opinion on this point.

Application refused.

NOTE.—The motion was renewed before the Supreme Court of Nova Scotia in Banco (Weatherbe and Ritchie, JJ., Graham, E.J., and Meagher, J.), on January 18th 1902, and judgment was reserved. On February 22nd, 1902, Weatherbe, J., the senior presiding judge at the argument, announced in Court that the Court being equally divided in opinion, both on the preliminary objection and on the merits, no order could be made, and the prisoner was accordingly remanded.

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE RICHARDSON, MACLEOD, ROULEAU, WETMORE
AND MCGUIRE, JJ.

THE QUEEN V. WALKER.

Seduction—"Under promise of marriage"—"Under" equivalent to "by means of"—Prior engagement to marry—Renewal of promise—Misdirection to jury—New trial—Cr. Code secs. 182, 746.

1. To constitute the offence of seduction "under promise of marriage" provided for by Code sec. 182, it must be shewn that the seduction was accomplished by means of the promise.
2. A finding by the jury that the accused had previously become engaged to marry the girl and that he renewed the promise of marriage at the time of the seduction is insufficient to sustain a conviction for seduction under promise of marriage.

ARGUED: December 7, 1893.

DECIDED: December 9, 1893.

This was a Crown case reserved for the opinion of the Court of Appeal for reserved cases by MACLEOD, J.

REGINA, N.W.T., December 7, 1893.

N. F. Hagel, Q.C., for the defendant.

D. L. Scott, Q.C., for the Crown.

REGINA, December 9, 1893.

The judgment of the Court was delivered by RICHARDSON, J.:—

This is a Crown case reserved by MACLEOD, J., upon a charge preferred against Donald Walker, tried at Medicine Hat, 7th and 8th August, 1893, before him with the intervention of a jury, for that the said Donald Walker, being a person above the age of 21 years, at Medicine Hat, on or about the 5th November, 1892, did under a promise of marriage seduce and have illicit

connection with one Fanny Ford Small, an unmarried female of previously chaste character and under 21 years of age.

The accused was convicted, such conviction being based upon the special finding of the jury in writing:—"The verdict is that Donald Walker promised to marry Fanny Small in June, 1892, with the intention of carrying out his promise, but in November of the same year he seduced her, at the same time renewing his promise of marriage, and in our opinion no other man had connection with her."

The learned judge, on objection raised by Mr. Hagel, Q.C., who defended the accused, postponed the passing of sentence and admitted the convict to bail pending a reference to the Court of Appeal, to which the judge referred the question as to whether or not, upon the facts as found by the jury on the learned judge's charge, the said Donald Walker was properly convicted.

The learned judge informs the Court that at the trial he had "grave doubts" as to what construction should be given the words "under promise of marriage," used in sec. 2 of ch. 48, 50 and 51 Vict. [now sec. 182 of the Criminal Code, 1892], the clause under which the charge was laid, but giving what consideration he was then enabled to give to it, in the absence of any authorities within reach to assist him, he charged the jury that in his judgment what the legislature intended to punish was "the seducing of young women under 21 by men over 21 to whom they were engaged."

The question for our consideration is in effect whether or not the trial judge rightly interpreted the Act in charging the jury in leading them to infer that if they found that Fanny Small was a female under 21 years of age, that the accused's age exceeded 21, and that he had promised to marry her, and had while so engaged seduced her, the offence was complete.

The section of the Act dealing with the offence reads "every one above the age of 21 years who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character, and under 21 years of age, is guilty of a misdemeanour....."

To us the proper construction which should be given this section is:—

That whoever accomplishes the seduction described by means of a promise of marriage, in other words, whoever influences the female, by the promise made, to yield to his embraces, is guilty, etc.

In order to ascertain the meaning of “under,” in the expression “under promise of marriage,” we must look at the first part of the section and observe the collocation of the words. “Everyone above the age of 21, who, under promise of marriage, seduces,” etc. Now, “under promise of marriage” must be taken to qualify either “who” or “seduces.” If it qualifies “who,” it will probably mean to describe him as a person who has become under the obligation to marry, but if it qualifies “seduces,” then it must intend to indicate the means by which the seduction is effected. The word is capable of either of these meanings.

In Webster’s Dictionary one of the meanings is “(c) Denoting relation to something that.....furnishes a cover, pretext, pretence, or the like, as ‘he betrayed him under the guise of friendship,’ ” showing the means by which something was accomplished. In the common expression “to do a thing under threats,” would mean to do it by reason of the threats. Now, looking again at the section, we find a phrase qualifying “everyone,” namely, “above the age of 21 years.” If the expression “under promise of marriage” had been intended to further qualify “everyone” it is reasonable to expect that it would have followed immediately after the word “years,” being connected therewith by the word “and.” But such is not the case. Apparently, the qualifications of “everyone” end with “years,” “who” is introduced, and then comes “under promise of marriage,” just where we almost invariably find adverbs introduced to qualify the verbs which follow. “Everyone who unlawfully and maliciously does injury.....” for example.

Had the statute used “unlawfully and maliciously” to qualify “seduces,” that is just where these words would have been placed, between “who” and “seduces.” Again, if “under,

etc.,” were intended merely to qualify or describe “who” as a person engaged to the female, it would probably have read thus, “everyone who *being* under promise, etc., seduces, etc.”

For these among other reasons we think the expression “under promise of marriage” qualifies “seduces,” that is, shews the means by which the seduction is effected. We conceive that the interpretation which we give to the Act is that aimed at and intended by Parliament in enacting it, and that it was never intended to make the seduction of a female under 21, at any time during the currency of a promise of marriage, by a promiser over 21 years of age, a criminal offence.

Notwithstanding that the view we take may be open to some possible doubt, it is conceived that it is the correct one, and that the jury should have been so instructed in order that they might find directly upon the evidence whether the seduction was attained by means of a promise of marriage on the part of the accused, or that he by the promise of marriage influenced Fanny Small to yield to his embraces, in which case the verdict should be guilty, otherwise the accused should be acquitted. The jury was not so instructed, and it appears to us to have been essential that the minds of the jury should have been clearly drawn to the question whether the seduction was accomplished by means of the promise or not.

From the finding of the jury it does not appear how they would have found had the construction, which we hold to be the proper one, been placed upon them. If the construction we place upon the Act is open to doubt, it is equally plain that that placed before the jury is also doubtful, and there being some reasonable doubt, the accused ought to have the benefit of the doubt. The case is one in which in our view a mis-trial has occurred, but not one in which an acquittal should be directed.

The opinion entertained by the Court is:

That the ruling of the learned trial Judge was erroneous, that there has been a mis-trial in consequence, and that in our judgment there should be a new trial, which the Court directs.

New trial ordered.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE WEATHERBE, TOWNSHEND AND MEAGHER, JJ., AND
GRAHAM, E.J.

THE KING V. ARTHUR GEORGE.

*Theft—Speedy trial—Form of “charge”—Describing the offence—Record on
speedy trial—Cr. Code secs. 305, 558, 767—Code forms MM and NN.*

1. A charge of theft preferred under the speedy trials clauses of the Code is sufficient if it states that the accused “unlawfully did steal,” etc., without specifically averring a taking or converting “fraudulently and without colour of right and with intent,” etc., in the words of section 305 of the Criminal Code.
2. As the statutory form of record under the speedy trials clauses (Code forms MM and NN) framed in respect of a charge of theft, does not contain such particulars, the description of the offence following such form must be held sufficient in the “charge” and in all the proceedings prior thereto.

ARGUED: December 6 and 9, 1901.

DECIDED: January 14, 1902.

Crown case reserved by WALLACE, Co.J., at Halifax, as follows:—

The prisoner was charged before me under sections 305 and 356 of the Code, that on a certain day in the month of April, A.D., 1901, he unlawfully did steal one piece of Oregon pine wood, of the value of five dollars and forty cents, the property of His Majesty the King. At the conclusion of the evidence, Mr. Power, counsel for the accused, objected that the charge of stealing in this case must allege that the offence was committed fraudulently and without colour of right. I found the prisoner guilty, but at the request of his counsel I suspended sentence, and granted a reserved case upon the following question:—

1. Is the charge to which the prisoner pleaded, and on which he was tried, bad by reason of its omitting to charge the offence as having been committed fraudulently and without colour of right, and, if yes, is the conviction therefore bad, the accused not having objected until after the close of the evidence?

The only doubt which I entertain in respect of the sufficiency of the charge is caused by the opinion expressed by Mr. Justice

Taschereau in his work on the Code, at page 675, as to the restricted application of section 611 of the Code and the form FF given in schedule one. But for that opinion I would have had no doubt whatever as to the sufficiency of the charge, and would have refused the application for a reserved case.

(Signed) W. B. WALLACE,

*Judge of County Court, District
No. 1, and Judge of the County
Court Judge's Criminal Court
for the County of Halifax.*

HALIFAX, N.S., December 6 and 9, 1901.

John J. Power, for the prisoner.

F. F. Mathers, for the Attorney-General of Nova Scotia and Minister of Justice, *contra*.

HALIFAX, January 14, 1902.

WEATHERBE, J. (dissenting):—The charge against the prisoner is that he “did unlawfully steal one piece of wood,” etc.

It seems to be admitted that the word “unlawfully” does not add to the validity of the charge, and, therefore, the question is whether the accusation is good by reason of the words “did steal one piece of wood,” etc. This leaves undisposed of a question whether the word “unlawfully” vitiates the conviction.

Formerly an indictment required the words “did feloniously steal, take, and carry away,” etc. The common law is preserved by the Code, sec. 7, and this is a point which cannot but have the greatest weight. By the Code, theft, or stealing, is defined to be the act of fraudulently, and without colour or right taking anything with intent to deprive the owner temporarily or absolutely of such thing.

It must be observed that this is a definition of the word “theft,” or “stealing,” in relation to the criminal law—not the word stealing alone. It cannot be disputed that if the prisoner

had been charged in the language of the definition, that would have been a valid charge. The word "steal," to indicate a crime, always, I think, required additional words, and unless the legislation is explicit on that subject, it is difficult to say that we should be justified in so important an innovation as to rely solely on the one term "did steal," etc., in a charge of larceny or theft. We must, of course, read together all the changes made by legislation.

It is significant that the word used in conjunction with the word stealing is "theft," to which the definition applies with equal force, and the question is, ought the word "theft" not to have the function of describing the crime. This raises the question whether the use of the word "theft" may not be relied on as well as the word "steal" in charging the crime—that he did commit theft in relation to one piece of wood, etc.—or whether the grammatical difficulty will operate to establish a distinction in favour of the words "did steal," etc. Certainly the words "did commit theft," etc., would be as valid a notice to a prisoner as the words "did steal." The intention of the Legislature would seem to be to substitute the words did "fraudulently and without colour of right," take, etc., for the old form of "did feloniously steal, take, and carry away," etc. With deference, I think this construction of the Code is more reasonable and in accordance with the criminal law, and less likely to lead to confusion.

Difficulties have not unfrequently arisen respecting definitions of larceny, and the statute has been framed with a view to comprehending conduct formerly not recognized as larceny. This question is one of difficulty, but I cannot come to the conclusion that the language now complained of is sufficient, and, therefore, I think the conviction bad.

MEAGHER, J., delivered the opinion of the majority of the Court as follows:—

The prisoner was charged before the learned judge who reserved the case with this offence, viz.: "That on a certain day

in April, A.D., 1901, he 'unlawfully did steal one piece of Oregon pine wood of the value of \$5.40, the property of His Majesty the King.' "

Counsel for the accused upon the trial contended that the charge was insufficient and that it should have set out in substance all the elements which, under sec. 305 of the Code constitute the offence of theft or stealing: in other words, that it should have been averred that it was done "fraudulently and without colour of right and with intent," etc.

Theft or stealing is defined by sec. 305 to be the act of fraudulently and without colour of right taking.....anything capable of being stolen, with intent to deprive the owner.....temporarily or absolutely of such thing.

By sec. 558, a complaint, or information, charging an indictable offence may be laid before a magistrate in the form C, schedule one, or to the like effect. It is thus stated in the form:—"The information and complaint of C. D.....who saith that, etc. (stating the offence)."

It appears to me, having regard to sec. 305, that if the offence were thus described:—"that on or about the 10th day of April, A.D., 1901, at Halifax, Arthur George unlawfully did steal one piece of Oregon pine wood of the value of \$5.40, the property of His Majesty the King," it would disclose an indictable offence, and in the light of that section, which the accused must be presumed to know, it would convey to him a charge of having taken it fraudulently and without colour of right, and with intent to deprive His Majesty temporarily or absolutely of it.

If committed for trial, the commitment was to contain the same or a similar description of the offence. If it did, it clearly would be sufficient, and in *Regina v. Leet*, 20 C.L.T. (occasional notes), 46, the learned Chief Justice held such a charge sufficiently definite.

Upon being brought before the County Court judge to ascertain whether he would elect to be tried under the provisions relating to speedy trials, or not, the County Court Judge would comply with the statute so far as describing the offence is con-

cerned by reading to him the statement which I have suggested would be sufficient if in an information.

If he consented to be tried speedily a charge might properly enough be preferred against him in the same terms as those upon which he was committed for trial; and if convicted, a record would be made in the form prescribed (form MM) which is:—

“Be it remembered that A. B., being a prisoner in the goal of the said county committed for trial on a charge of having on ‘the —— day of —— in the year —— stolen,’ etc. (*one cow, the property of C. D. or as the case may be, stating briefly the offence*), etc.”

The words within brackets are there given not only as an example of the mode of describing the offence, but as shewing the terms in which it was intended by Parliament the offence should or might be described. These words must of necessity be understood and taken as having reference to and as repeating the offence charged in the proceedings prior to, as well as in, the charge preferred before the County Court judge, and upon which he was tried. The charge in the record being the one upon which he was committed, tried and convicted, must necessarily follow and correspond with that contained in each of these steps, and would not be greater nor less in point of description of the offence than they were. I am speaking with reference to a case where no change was made in the charge.

Parliament must have intended, and I submit it is obvious it did so intend, that the description of the offence, viz.: having unlawfully stolen one cow, the property of C. D., or perhaps even without that prefix to “stolen,” was not only sufficient with respect to the record of conviction, but also that it was sufficient as a description “of an indictable offence,” in any of the proceedings which preceded the conviction, and of which the record was but a transcript.

It is, I think, impossible to say, consistently with reason, bearing sec. 305 in mind, when a party is charged with having unlawfully stolen an article, the property of another, that an

indictable offence is not disclosed—nothing beyond that in such a case as this is necessary.

The words “unlawfully did steal” in the charge mean and include everything necessary to constitute the offence of theft or stealing as defined by sec. 305. They are the equivalent, at least, of the words of the indictment, viz.: “did feloniously steal, take, and carry away,” because under sec. 305 they mean that the stealing or theft which was committed was done fraudulently and without colour of right and with intent, etc.

The old indictment conveyed the idea that the accused took the goods fraudulently and without colour of right, and equally so now under the Code do the words used in this charge convey the same idea, viz.: that it was fraudulently and without colour of right, etc.

In my opinion the conviction is entirely right so far as this question is involved, and an order should pass remitting the matter to the judge below, so that sentence may be pronounced upon the accused.

TOWNSHEND, J., and GRAHAM, E.J., concurred with MEAGHER, J.

Conviction affirmed (WEATHERBE, J., dissenting).

[SUPREME COURT OF THE NORTH-WEST TERRITORIES.]

BEFORE RICHARDSON, ROULEAU, McGUIRE AND WETMORE, JJ.

THE QUEEN V. FORSYTHE.

Theft—Cattle stealing—Evidence of ownership—Brand—Earmark—Deposition taken at preliminary enquiry—Reading of, in evidence at trial—Evidence of absence of deponent from Canada—Sufficiency of—Cr. Code secs. 331, 687, 707a.

1. The production of a steer's hide with the prosecutor's brand and ear-marks only upon it, and the evidence of the prosecutor that he had owned and had never parted with the steer from which the hide had come, is sufficient proof of identity of the steer as the property of the prosecutor. (See now Cr. Code s. 707a).
2. Evidence that a witness at the preliminary enquiry was a corporal in the N. W. Mounted Police, that he had been sworn in as a member of "Strathcona's Horse," for active Service in the South African war, that he had left the post at which he had been stationed to join the latter force, and that, in the opinion of the deponent, if he had left the latter force he would have returned to such post, as in fact it would have been his duty to do, which fact would thereupon have become known to the deponent, was sufficient evidence of the absence of such witness from Canada to justify the admission as evidence at the trial of the deposition of such witness taken at the preliminary enquiry.
3. In reviewing the evidence of absence from Canada given for the purpose of admitting a deposition in evidence, the appellate Court should only consider whether such evidence was such as should reasonably satisfy a trial judge in finding the fact of absence.

ARGUED: July 19, 1900.

DECIDED: July 21, 1900.

This was a Crown case reserved. The defendant was tried before SCOTT, J., at Maple Creek, on April 25th and 26th, 1900, upon the following charge:—"That the said Harry Reginald Forsythe, at Maple Creek aforesaid, on or about the 8th day of November, 1899, one steer, the property of John Lawrence, senior, unlawfully did steal," and was convicted and sentenced to imprisonment in the penitentiary at Stony Mountain, Manitoba, for the term of two years and eight months.

It was proved to the satisfaction of the learned trial judge by several witnesses, that the steer in question was branded with the letters "J.L." in the form of a monogram, similar to the brand described in the evidence of John Lawrence, senior, the

alleged owner, that it bore the ear marks described by him in his evidence, and that, after a careful inspection of the hide of the animal, no other brands could be found upon it.

The only evidence which in any way tended to show that the animal in question was the property of any person other than Lawrence was the statement of the defendant to the effect that he had purchased it from one Lamon, and the production of a document in defendant's handwriting purporting to evidence the sale to him, and which he stated was signed by Lamon. This statement the learned trial judge stated he did not believe.

The evidence of John Lawrence, senior, was as follows:—

To Mr. Conybeare:—

“I am a rancher; my ranch is on Fish Creek, 8 miles from Maple Creek; I examined the hide, exhibit “A,” to-day; the animal that it came from was owned by me; I never parted with it; I recognize the hide by the marks upon it, viz., by the brand and the ear marks; exhibit “C” is a representation of the brand upon it; the right ear is square-cropped, and there is an over-slope on the left ear.”

To Mr. Nolan:—

“I have lived at Fish Creek about ten years; I have between 500 and 600 head of cattle of all ages and color. It is by reason of the brand and the ear marks alone that I recognize the hide as that of an animal owned by me; my brand is “J.L.” in the shape of a monogram on the left hip or thigh; sometimes on one and sometimes on the other; my vent is a bar under the brand; I do not always vent the beef cattle when I sell them in large bunches; Benallick is a buyer in Winnipeg to whom I sometimes sell; I also sell to Wilson, a Toronto buyer; I do not vent the cattle I sell to them; they can either ship them or sell them here as they please, but I do not think they sell them here. All I sold them last year were shipped to Winnipeg; I went with them; I have sold cows that I did not vent; I never sold any

steers singly; I always sell my steers in bunches. I usually vent cows when I sell them; I sold James Labbing a cow; I did not vent it, but Labbing afterwards put his brand upon it; my cattle run about 12 or 15 miles from here. I believe exhibit "A" to be the hide of the steer; it does not look like the hide of a cow; I think it is the hide of a three-year-old steer; I think it is not that of a five-year-old; I sold my three and four-year-old steers for beef; all the steers I sold last year and the year before were shipped by rail from here; I brought them down and saw them shipped from here."

To Mr. Conybeare:—

"The two branding irons I now produce are branding irons I use in branding my cattle; I have two others which I also use, the brand being of the same device and shape, but one is larger than these and the other smaller; a brand mark increases in size as the animal grows older."

To Mr. Nolan:—

"I have not my certificate of the registration of my brand; I could not find it; I have no branding iron with a loop at the end of the curve of the J as shown in exhibit "B"; when I made exhibit "B" I did not give a proper description of the brand in that respect; the brand mark will increase with the growth of the animal in all cases."

The learned trial judge was satisfied that the hide produced in Court was the hide of a steer.

Counsel for the Crown proposed to put in as evidence for the prosecution, under section 687 of the Criminal Code, the depositions of David Nichol, taken by Frank Harper, the justice of the peace who presided at the preliminary investigation of this charge, contending that the evidence of David Paterson established the fact that Nicol was absent from Canada.

So far as material to the questions submitted, the evidence of David Paterson was as follows:—

To Mr. Conybeare:—

“I am orderly-room clerk in the North-West Mounted Police Barracks at Maple Creek; I occupied the same position in November last.

“I know Frank Harper; he is a justice of the peace; he presided at the preliminary hearing of this charge; the defendant was present at the hearing and the depositions were taken in his presence; Mr. Nolan, his counsel, was also present and representing him; I think the defendant had a full opportunity of cross-examining the witnesses; I know there was a dispute, but the difficulty was got over in the afternoon; David Nicol left here to join Strathcona's Horse; I am not sure whether he is in Canada or not; when he left here his destination was South Africa; he was sworn in here as a member of that force in my presence.”

To Mr. Nolan:—

“I have heard that some of those who joined that force were discharged before it left; I will not swear that he is not in Canada at the present time.

“Nicol was a corporal in the police force stationed here when he joined the Strathcona Horse, and was acting quartermaster sergeant; if he had left that force I think he would have returned here; he was shown on the rolls here as absent on leave. but on the first April all those who went with the force to South Africa and returned as absent on leave were transferred to the depot division of the police force.”

Counsel for the defendant objected to the admission of the depositions as evidence on the ground that it had not been shown that Nicol was absent from Canada. The learned trial judge ruled that the evidence established beyond a reasonable doubt that Nicol was absent from Canada, holding that the fact of the witness not being able to swear positively that Nicol was absent at that time was immaterial, so long as the facts stated by him reasonably led to the conclusion that he was so absent:

that, in fact, it would under ordinary circumstances be impossible for any person to swear positively that at the time of his giving evidence another person was absent from Canada.

The questions of law submitted for the opinion of the Court were:—

1. Was the evidence as above stated sufficient to justify the learned trial judge in finding, as he did, that the steer in question was the property of John Lawrence, senior?

2. Was the evidence as to the absence of David Nicol from Canada at the time of the trial sufficient to justify, on the ground of such absence, the admission under section 687 of the Criminal Code of his depositions taken at the preliminary investigation of the charge?

CALGARY, July 19, 1900.

C. F. P. Conybeare, Q.C., for the Crown.

P. J. Nolan, for accused.

The following cases were referred to:—*Queen v. Graham*, Can. Cr. Cas. 388; *Queen v. Farrell*, 43 L.J.M.C. 94; L.R. 2 C.C. 116; 30 L.T. 404; 22 W.R. 578; 12 Cox C.C. 605; *Regina v. Nelson*, 1 O.R. 500; *Regina v. Stephenson*, 31 L.J.M.C. 147; L. & C. 165; 8 Jur. (N.S.) 522; 6 L.T. 334; 10 W.R. 546; 9 Cox C.C. 156.

Judgment was reserved.

REGINA, July 21, 1900.

MCGUIRE, J.:—As to the first question, we are of opinion that the fact of the prosecutor's brand being upon the hide was a means of identifying it as his property. The practice of branding has become the recognized mode of marking animals so that the owner may recognize them, and so widely used is it that it has become almost the only means employed for that purpose. Where a person has but a few animals, he may be able from frequently seeing them to become well enough acquainted with their appearance to recognize them without, perhaps, being able to

point out the various peculiarities by which he knows them. But when the herd is a large one and no one may have had sufficient opportunities to become acquainted with all the many little peculiarities which may distinguish the members of that herd from all other animals, then it becomes necessary that some practically indelible mark should be placed on them, and branding has been found to be the best mark for that purpose. It is in every cattle country a well recognized mode of identification, and to say that it is not a reasonable means is to say that all cattle dealers are wrong in recognizing it as such. It is, of course, not an infallible mark. It may have been put on by mistake, or by fraud, or the animal, though the property of the owner of the brand at one time, may subsequently have been parted with. But these remarks apply equally to whatever marks may be relied upon as proof of identification. The weight of the evidence afforded by a brand may be reduced by circumstances of various kinds even to the vanishing point. A person's name written or stamped on the books in his library may be fairly strong evidence that a particular book with his name in it is the property of the owner of that name, but if it be shewn that he has been selling his books so marked, and might have sold this one, its value as proof would be weakened. Again, a bookseller puts a label inside all the books on his shelves. In such a case the finding of a book so labelled in the possession of another might be taken as very weak evidence of it being still the property of the bookseller. A common way among lumbermen to mark their logs is to impress a particular letter or stamp on them, and logs having such mark are in practice admitted to be the property of the person whose mark they bear. But here, too, the weight of this as evidence may be impaired or destroyed by various circumstances needless to mention. In short, the reasons given by a witness for saying that an animal is his must be considered by the tribunal trying the matter, and their weight is entirely for that tribunal. In this case the prosecutor swears that the animal, the hide of which he had examined, was owned by him. Then he gives his reasons for saying this; he recog-

nized the hide by the brand and ear marks. He also swears this was a steer, and in his opinion a three-year-old, and that he sells steers only in bunches, and that all the steers he sold for the two preceding years were shipped away by rail. I think this was clearly evidence proper to be submitted to a jury, and for the same reason proper to be considered by Mr. Justice Scott sitting as a jury, and such weight should be given to it as all the circumstances will seem to warrant. Mr. Justice Scott was satisfied as to the identification, and we think he was justified in so being.

As to the second point—the admission of the deposition of Nicol—it was shewn by a member of the N.W.M.P. that Nicol was a corporal in that force stationed at Maple Creek, and was sworn in there as a member of “Strathcona’s Horse,” and as such left Maple Creek, his destination being South Africa. While some of those who sought to go with that force were discharged before leaving Canada, the witness (the orderly room clerk at Maple Creek) was of opinion that had Nicol been so discharged he would have returned to that place. That he did not so return up to 1st April may be inferred from the statement of the witness that he was not sure whether Nicol was in Canada or not—he would have known had Nicol returned there. Had proof been given of his not having returned after April 1st to Regina, the proof would have been stronger, but it was not necessary to accumulate testimony if that already produced is sufficient for that purpose. It must be borne in mind further that Nicol was not an ordinary person free to go where he pleased. A civilian starting for South Africa might change his mind before leaving Canada, but Nicol was sworn in as a member of Strathcona’s Horse, and was not a free agent, and, unless discharged, had no choice but to go with that force. Again, a civilian desirous of joining that force and rejected, say at Halifax, might not be presumed to return to the point he started from, but Nicol was still a member of the N.W.M. Police, and while with Strathcona’s Horse was regarded as “on leave,” and if discharged from Strathcona’s Horse it would be his duty to

return to his service as a member of the N.W.M. Police. He had, it seems not done so, at least up to April 1st, and the trial took place on April 25th.

The proof of absence from Canada is a matter for the judge at the trial, and if it is such as reasonably to satisfy him, and he is satisfied, the fact is proved.

We were referred by counsel for the prisoner to the cases of *Reg. v. Graham*, 2 Can. Cr. Cas. 388, and *Reg. v. Farrell*, 43 L.J.M.C. 94; L.R. 2 C.C. 116; 30 L.T. 404; 22 W.R. 578; 12 Cox C.C. 605. In the former case the only evidence of the absence of the witness was very weak, being that of a constable who had been unable to find a deponent to serve a subpoena on him, and who had been told by a man who was not produced to testify that the deponent had left the country. This was secondary evidence where the primary evidence might have been produced. The other case decides only that proof of old age and nervousness of the witness is not proof that she was so ill as not to be able to travel. It was proved she could travel to London to see her doctor, and that she was at the time of the trial in the assize town and not far from the Court. That was clearly not evidence reasonably such as to satisfy the Court that she was so ill as to be unable to travel.

On the other side, Mr. Conybeare, for the prosecution, referred us to *Reg. v. Nelson*, 1 O.R. 500. The proof there was, we think, not nearly so satisfactory as in the present case, yet the majority of the Court held it sufficient. In *Reg. v. Wellings*, 47 L.J.M.C. 100; 3 Q.B.D. 426; 38 L.T. 652; 26 W.R. 592; 14 Cox C.C. 105, Lord Coleridge said: "It is in each case a matter for the presiding judge to determine. The presiding judge has in this case decided that the evidence was sufficient to satisfy him that the deponent was 'so ill as not to be able to travel,' and we see nothing to lead us to the conclusion that he was wrong." In *Reg. v. Stephenson*, 31 L.J.M.C. 147; L. & C. 165; 8 Jur. (N.S.) 522; 6 L.T. 334; 10 W.R. 546; 9 Cox C.C. 156, Sir W. Earle, C.J., said:—"We are all of the opinion that the question

of whether the illness proved is or is not within the statute, is a question for the determination of the presiding judge, and that if, to his mind, exercising his discretion upon the facts proved, the evidence of illness is sufficient, this Court ought not to interfere with his decision." In *Reg. v. Nelson*, 1 O.R. 500, Cameron, J., dissented from the opinion of the majority of the Court, and one is not surprised at that. The evidence was fairly open to the criticism that it was not reasonably sufficient. We agree with Cameron, J., that in a case reserved the Court ought to answer whether the evidence was sufficient to justify the judge in finding as he did, and not merely to say that it was a matter in his discretion, and that having exercised that discretion as he did the Court would not interfere. We think the Court should consider whether the evidence was such as would *reasonably* satisfy the judge in finding that the fact of absence has been proved. As already pointed out, we think the evidence in this case was of that character. In our opinion the conviction should be confirmed.

RICHARDSON and WETMORE, JJ., concurred.

ROULEAU, J. (dissenting):—I am sorry I cannot come to the same conclusion as my brother judges on the first question submitted by Mr. Justice Scott.

The only evidence as to property which was adduced in this case was this:—"It is by reason of the brand and ear marks alone that I recognize the hide as that of an animal owned by me." There is no evidence that he branded that animal himself, or that he had in his bunch any of the class of animals which the skin was supposed to belong to. I hold that a simple mark or brand on any animal, without any other corroborative evidence is not sufficient to convict. Suppose a man lost a coat, and a person was found in possession of it, and the owner of the coat swore that he knew that the coat was his because a button was sewed on it bearing his initials. When asked if he put the button there himself, he would answer "No"; whether he knew the coat otherwise, he would say "No." I don't think any judge

would contend that this evidence would be sufficient to convict of theft. The evidence no doubt would prove that the button was his, but it would not be sufficient to prove property in the coat. It is some proof that the coat bearing that button belongs to him, but not *primâ facie* proof that the coat belongs to him; I mean not sufficient evidence to oblige the incriminated individual to adduce evidence to contradict that statement or explain it. I hold, therefore, that the brand and ear marks on an animal are not *primâ facie* evidence of ownership, so as to find a man guilty of theft, unless there is corroborative evidence in support. It is a well-known fact that any man can put the brand of another man on cattle, and it would be a very dangerous precedent to say that because his brand is on these cattle he is supposed to be the owner of them. The brand or marks put on cattle is for the purpose of general identification, not for the purpose of ownership. It is a common practice in this country to put a man's brand on cattle that he does not own at all, but are owned by somebody else who has no brand of his own.

As to the second question, I agree with my brothers.

Conviction affirmed.

Note: *Identification of cattle by brands.*

By section 707A of the Criminal Code as enacted by Stat. Can. 1901, 1 Edw. VII, c. 42, cattle brands registered according to local law are made evidence of ownership in criminal prosecutions. The section is as follows:—

“In any criminal prosecution, proceeding or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be *prima facie* evidence that such cattle are the property of the registered owner of such brand or mark; and where a person is charged with theft of cattle, or with an offence under paragraph (a) or paragraph (b) of section 331A respecting cattle, possession by such person or by others in his employ or on his behalf of such cattle bearing such a brand or mark of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval.”

[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J.C.P., MACMAHON, AND LOUNT, JJ., SITTING
AS A DIVISIONAL COURT.

THE KING v. MCGREGOR.

Municipal law—Police powers—Prevention of fires—By-law regulating storage of petroleum products, coal oil, naptha, etc.—Concurrent Dominion legislation—Petroleum Inspection Act, (Can.) 1899—Constitutional law—Ontario Municipal Act, R.S.O. 1897, c. 223, s. 542 (17).

1. Coal oil, crude oil and naptha are "combustible or dangerous materials" within the meaning of the Ontario Municipal Act, sec. 542, which authorizes the passing of by-laws for fire prevention regulating the keeping and storing of "gunpowder and other combustible or dangerous materials."
2. Municipal regulations of a merely local character, made in exercise of police powers for the prevention of fires and authorized by provincial legislation, are not invalid as to the storage of petroleum and its products because of Dominion revenue laws dealing with such storage, nor are they an interference with "trade and commerce" within the meaning of the British North America Act.

ARGUED : February 17, 1902.

DECIDED : May 13, 1902.

THIS was a motion to make absolute an order *nisi* to quash a conviction made by the police magistrate of the city of Windsor on the 15th May, 1901, of the appellant, for that he on the 7th March, 1901, "and divers other days previous, being agent of the Queen City Oil Company, did keep at one time in a house or shop within the limits of the city of Windsor a larger quantity than three barrels of coal oil, rock oil, water oil or other similar oils, and a larger quantity than one barrel of crude oil, burning fluid, naptha, benzole, benzine or other combustible or dangerous materials, contrary to a certain by-law of the municipality of the city of Windsor, in the county of Essex, passed on the 9th day of August, A.D., 1897, and intituled a by-law for the prevention of fires and for other purposes therein mentioned."

TORONTO, February 17th, 1902.

G. F. Shepley, K.C., for the applicant. There was no power to pass the by-law in question here, and therefore the conviction cannot be supported under it : sub-sec. 17 of sec. 542 of the Municipal Act R.S.O. ch. 223, does not authorize the passing of a by-law dealing with coal oil, etc. The sub-section deals with gunpowder and "other combustible or dangerous materials." These latter words must be restricted to explosives of like kind as gunpowder. The case comes within the *ejusdem generis* rule. This is borne out by the Act of 1899, 62 Vict. (sess. 2) ch. 26, sec. 34, amending sec. 542, the added sub-sections clearly shewing that the words are used in the limited sense. As to the meaning of the word "combustible" see Murray's new English Dictionary, tit. "Combustible." The Provincial legislation is superseded by the Dominion legislation. The Provincial legislation is only to be in force so long as there is no Dominion legislation on the subject. The moment the matter is dealt with and the field covered by Dominion legislation it overrides the Provincial legislation, and the latter ceases to have any effect : Dominion Petroleum Act 1899, 62 & 63 Vict. ch. 27, secs. 26, 32 (D.); R.S.C. ch. 102, secs. 25, 32 ; Orders in Council, 2nd Aug., 1899 and 6th Oct., 1881.

W. M. Douglas, K.C., for the prosecutor, contra. The by-law was validly passed under sub-sec. 17 of sec. 542, for the words "other combustible or dangerous materials" used in the sub-section cannot be restricted merely to substances similar to gunpowder. The decisions shew that the *ejusdem generis* principle is not to be construed in the restricted sense contended for by the other side. The principle is that you must look at the object and purpose of the Act and give to the words their full reasonable meaning, and so construing the words here they would clearly include the substances referred to in the by-law ; *Anderson v. Anderson*, [1895] 1 Q.B. 749 ; Maxwell on Statutes, 3rd ed., p. 475 ; *Regina v. Solly* (1856), 1 Dears. & B. 209. Then as to the Dominion legislation this is expressly

made subject to the municipal legislation as appears in the Order in Council passed on the 6th Oct., 1881, which is still in force.

J. R. Cartwright K.C., for the Attorney-General of Ontario, contra. The only question that the Attorney-General is called upon to discuss is the constitutional one. There is no question now, since the decision in the Manitoba case by the Privy Council, namely, *Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A.C. 73, that the local legislature has power to deal with this matter.

TORONTO, May, 13. 1902.

MEREDITH, C.J.:—No objection is taken to the form of the conviction, the appellant being desirous of testing the validity of the by-law and of the provision of the Municipal Act under the authority of which the council assumed to pass it.

The validity of the Provincial legislation relied on by the respondent being called in question, the motion stood over in order that the Attorney-General of the Dominion and the Attorney-General of the Province might be notified, and notice having been given to them, the motion came on again to be heard, when counsel appeared on behalf of the Provincial Attorney-General, but no one for the Attorney-General of the Dominion.

In support of the motion, counsel for the applicant contended:

(1) That the articles, which the applicant was convicted of having kept contrary to the provisions of the by-law, were not covered by the provisions of sub-sec. 17 of sec. 542 of the Municipal Act, and that there was no power to pass the by-law under that or any other provision of the Municipal Act.

(2) That the sub-sec., if it is applicable to the articles mentioned in the conviction, is *ultra vires* the Provincial Legislature and void.

The by-law is entitled "A by-law for the prevention of fires and for other purposes therein mentioned," and its recital is as follows:—

“Whereas it is necessary and expedient to make provision for the prevention of fires and to that end to regulate the erection and alteration of buildings and the accumulation and storage of inflammable and combustible materials in the city of Windsor.”

By its thirty-second section it provides as follows:—

“XXXII. No larger quantity than three barrels of rock oil, coal oil, water oil, or other similar oils, nor any larger quantity than one barrel of crude oil, burning fluid, naphtha, benzole benzine or other similar combustible or dangerous materials shall be kept at one time in any house or shop within the limits of said city; nor shall any person permit any of the said fluids to leak or flow into any drain or sewer in said city. Provided nevertheless that when fire-proof buildings, so constructed as to insure at all times thorough ventilation thereof, and to be used exclusively for the purpose of keeping or storing rock oil, coal oil, water oil, or other similar oils, are sufficiently drained, according to any rules or regulations of the Department of Inland Revenue of the Dominion of Canada, and are isolated or detached at least ten feet from any other building; and when fire-proof buildings, constructed and drained as aforesaid, to be used exclusively for the storing of burning fluid crude oil, naphtha, benzole, benzine or other similar combustible or dangerous materials, and isolated or detached at least 100 feet from any other building, then in both of said cases the fluids severally mentioned may be kept and stored in said buildings respectively in such quantities as said council by resolution thereof may determine;” and it was for an offence against this section that the conviction was made.

The authority mainly relied on to support the by-law is sub-sec. 17 of sec. 542 of the Municipal Act. The section forms part of division 6 of the Act; and, according to its heading, division 6 deals with protection to life and property. Sections 542, 543 and 544 form sub-division 3 of division 6, and the sub-division is stated to be one dealing with “prevention of fires.”

The sub-section itself is headed, "Storing and transportation of gunpowder," and is as follows:—

17. For regulating the keeping and transporting of gunpowder and other combustible or dangerous materials; for regulating and providing for the support by fees of magazines for storing gunpowder belonging to private persons; for compelling persons to store therein; for acquiring land as well within as without the municipality, for the purpose of erecting powder magazines; and for the selling and conveying such land when no longer required therefor."

It was argued by Mr. Shepley that the *ejusdem generis* rule should be applied to the words "and other combustible or dangerous materials," and that they, therefore, apply only to articles or things which are combustible or dangerous, like as gunpowder is, and that they must therefore be confined to explosives.

It has been pointed out in the more recent cases that the rule which Mr. Shepley invokes has been often pushed too far: *Anderson v. Anderson*, [1895] 1 Q.B. 749; *Re Stockport, Ragged, Industrial and Reformatory Schools*, [1898] 2 Ch. 687, at p. 696; and in the former of these cases the Court of Appeal approved the canon of construction laid down by Knight Bruce, V.C., in *Parker v. Marchant* (1842), 1 Y. & C. 290, that general words are to be given their common meaning unless there is something reasonably plain on the face of the instrument to be construed to shew that they are not used with that meaning, and that the mere fact that general words follow specific words is not enough. But even if the canon of construction were the reverse of this and, *prima facie*, the general words were to be given a restricted meaning (Maxwell on Statutes, 3rd ed., pp. 475-6), looking at the evident, if not the declared, purpose of the whole section—the prevention of fires—and the powers given by the various sub-sections to enable councils to pass by-laws to that end, it appears to me that the sense in which the word "combustible" and the word "dangerous" are used is that of liability to cause or spread fire.

It is hardly necessary to refer to dictionaries for the meaning of the word combustible; but if Murray is consulted it will be found that oil is mentioned as a combustible substance, and one of the meanings given for "inflammable" is "susceptible of combustion."

If the meaning I would give to sub-sec. 17 is given to it, as I understood Mr. Shepley, it is not disputed that the articles mentioned in sec. 32 of the by-law are combustible or dangerous, or both.

Mr. Shepley referred to the provisions of 62 Vict. (2) (Ont.) ch. 26, sec. 34, as supporting his contention, but they make, I think, against it. These provisions relate to the manufacture and storing of gunpowder and other explosive substances, and indicate that when it was intended to speak of a substance as an explosive one, the word "explosive" was used and not the word "combustible."

I do not mean to concede that the articles mentioned in sec. 32 of the by-law are not or may not be explosive; indeed, I think it very probable that they are or may be.

It was argued in support of the other objection to the by-law that, inasmuch as the Parliament of Canada, by the Petroleum Inspection Act, 1899, 62 & 63 Vict. ch. 27, has legislated on the subject of the storing of petroleum and naphtha, the Provincial legislation, in as far as it deals with the same subject, is superseded by the Dominion legislation.

The Act deals with the subject of the manufacture, sale and inspection of petroleum and naphtha, imposes penalties for, amongst other things, the keeping or offering for sale, or having in possession, of petroleum or naphtha which has not been inspected and entered for consumption through one of the ports or places duly authorized by the Governor in Council; and, by sec. 26, a penalty for keeping or storing of them when the provisions of the Act, or any order and regulation of the Governor in Council, or of any departmental regulations, have not been complied with. By sec. 32 the Governor in Council is authorized to make such

regulations for the storage and possession of petroleum and naptha as he deems necessary for the public safety ; and, by sec. 33, to designate places at which petroleum may be imported in tank cars and in tank ships, and, on the joint recommendation of the Ministers of Customs and Inland Revenue, to prescribe regulations under which it may be so imported ; and, by sec. 34, the Department of Inland Revenue is authorized to make regulations, not inconsistent with the Act, with respect to the transportation, shipment and sale of imported or domestic petroleum or naptha.

This Act was brought into force on the 1st September, 1899, by proclamation of the 19th August previous.

By Order in Council of the 2nd August, 1899, which was declared to be applicable to the Act of 1899, when its provisions should be brought into force by proclamation, regulations were prescribed in relation to the importation of petroleum in bulk in tank ships at certain customs ports.

These regulations have no bearing on the question to be decided ; but reliance was placed on the regulations of the 9th January, 1889, prescribed by Order in Council of that date, passed under the authority of sec. 25 of ch. 102 of the Revised Statutes of Canada.

This section is the same as sec. 26 of the Act of 1899, by which latter Act, ch. 102 of the Revised Statutes was repealed.

These regulations are in force notwithstanding the repeal of ch. 102 (R.S.C. ch. 1, sec. 7 (50)), and as far as they are material to the present inquiry are as follows :—

“Section 1. In cities and towns where there are municipal regulations or laws respecting the storage of petroleum and the products thereof, petroleum and naptha, which have been inspected as required by Act 44 Vict. ch. 23, or by “The Petroleum Inspection Act” aforesaid, and the inspection fees paid, may be stored in any building or place which is in conformity with the municipal regulations in that behalf.”

Assuming the provisions of these Acts and regulations to be *intra vires* the Dominion Parliament, it is clear, I think, that

they do not supersede the Provincial legislation referred to or any by-laws passed under the authority of that legislation.

The Provincial legislation was intended to confer power to make regulations in the nature of police or municipal regulations of a merely local character for the prevention of fires and of the destruction of property by fire, and applying the language of Sir Barnes Peacock in delivering the judgment of the Judicial Committee of the Privy Council in *Hodge v. The Queen* (1883), 9 App. Cas. 117, at p. 131, as such cannot be said to interfere with the general regulation of trade and commerce, which belongs to the Dominion, and do not conflict with the provisions of the Petroleum Inspection Act, 1899, or the regulations as to the storage of petroleum and naphtha, which are in force under the authority of that Act.

On the contrary, the Dominion regulations are carefully framed so as not merely not to conflict with the municipal regulations on the subject with which they deal, but to require these regulations to be conformed to as the condition upon which it is to be lawful to keep or offer for sale or have in possession petroleum or naphtha. See also *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348 ; *Attorney-General of Manitoba v. Manitoba License Holders' Association*, [1902] A.C. 73.

The objections taken to the conviction therefore fail, and the motion must be dismissed with costs.

MACMAHON and LOUNT, JJ., concurred.

Conviction sustained.

[COURT OF KING'S BENCH, QUEBEC.]

(APPEAL SIDE.)

DISTRICT OF MONTREAL.

BEFORE SIR ALEXANDRE LACOSTE, C.J., BLANCHET, HALL,
WURTELE AND OUMET, JJ.

THE KING v. WILLIAM LONG.

Character evidence—When evidence of prisoner's bad character admissible—Failure of prisoner's counsel to object—New trial—Duty of judge in criminal case to exclude illegal evidence whether objected to or not—"Full answer and defence"—Evidence of French-speaking witnesses against English-speaking prisoner not translated into English—Sufficient that prisoner represented by French-speaking counsel—Proof of death registry in Quebec—Acts of civil status—Certified extract—Canada Evidence Act, sec. 19—Cr. Code, secs. 659, 746.

1. Where an English-speaking prisoner in the Province of Quebec is represented at his trial by counsel speaking the French language, and no request is made for a translation of the testimony of French-speaking witnesses into English, for the benefit of the prisoner, the failure to so translate as to enable the prisoner to personally understand the evidence is not a limitation of his right to make "full answer and defence" to the charge, and will not invalidate a conviction.
2. Sec. 19 of the Canada Evidence Act, 1893, requiring ten days' notice of intention to prove certain official records by certified extracts therefrom, does not apply on a criminal trial to proof of births, deaths, and marriages by extracts from the registers of acts of civil status in the Province of Quebec.
3. The prosecution is not entitled to give evidence of the prisoner's bad character, unless or until the prisoner adduces evidence to prove his good character, either by examining his own witnesses on that point or by questioning the Crown witnesses thereon as a part of their cross-examination.
4. A new trial will be ordered where such evidence is wrongly admitted against the prisoner, although no objection was raised to it by the prisoner's counsel.

MONTREAL, May 27, 1902.

The judgment of the Court was delivered by WURTELE, J.:—

William Long was tried in the District of Beauharnois on the charge of having murdered one Denis Labre, alias Daniel

Loubert, on the 3rd October, 1901, in the Parish of St. Agnès of Dundee; the trial commenced on the 14th April, and terminated on the 28th April, 1902, on which last day he was found guilty.

His counsel, on the rendering of the verdict, intimated that a reserved case would be asked for on three questions of law which arose on circumstances which had taken place during the trial, and sentence was therefore not then pronounced. The next day application was made to the Court to reserve the three questions of law referred to, which arose from illegalities of which the prisoner complained.

The illegalities which he alleged to have occurred are:—

1. That while the prisoner does not understand the French language, the evidence of nine of the witnesses for the prosecution was given in French, and was not translated to him;

2. That the prosecution on its examination in chief of some of its witnesses, introduced evidence tending to establish that the prisoner's character was bad, and that particular acts of misconduct on his part were put in evidence, and particularly that he was a quarrelsome man, that he was such a dangerous man that people would be afraid to live in his neighbourhood, that he had fired a gun at one McMaster, that he had set fire to his house on the 7th December, 1900, that he was bad to his wife and children, and had beaten them, and, in short, that he was a bad citizen;

3. That the prosecution had produced in evidence the copies of two entries which had been made in the registers of acts of civil status, without having given, before the trial, to the prisoner the notice required by section 19 of The Canada Evidence Act, 1893.

On the 5th May instant (1902), the Court reserved the questions of law arising on the circumstances which the prisoner complained of, and stated a case for the opinion of the Court of Appeal on the three following questions:—

1. Should the Court have had the evidence which was given in French translated into English, which is the prisoner's language?

2. Could the Court admit on the examination in chief of witnesses for the prosecution evidence that the prisoner was a man of bad character and evidence of antecedents and criminal acts of the prisoner, which were not relevant to the issue in the case?

3. Could the prosecution produce in evidence the copies of the two entries in the registers of civil status without having given before doing so a notice of ten days to the prisoner?

We will begin with the first and last questions, which are of minor importance, and cannot affect the case, and we will then consider the second question, which is most important, and which is of such a nature that the trial and verdict will be affected by our decision.

With respect to the first question of law, the circumstances and the law regulating the matter can be given in a few words. During the trial, the evidence of nine of the witnesses for the prosecution was given in French and was not translated into English, which is the tongue spoken by the prisoner, who does not understand the French language. Every person who is charged with the commission of an indictable offence is entitled to be present in Court during his trial; and he has the right to make a full answer and defence to the charge made against him. He may defend himself either personally or by counsel, and, in the latter case, his counsel stands in his place to do and say anything which the defendant on his trial might do and say himself. Counsel for a defendant makes objections, cross-examines the witnesses for the prosecution, examines the witnesses called on the defendant's behalf, and addresses the Court and the jury. When a defendant is not defended by counsel he cross-examines the witnesses for the prosecution and addresses the jury respecting their evidence himself (Prentice on Criminal Law Procedure, p. 137); but in order to do so efficiently and have the benefit of the full answer and defence to which he is entitled, it is necessary that he should understand the language in which the witnesses gave their evidence, and when he does

not understand the language of the witnesses he is entitled to have the evidence translated to him, but this rule does not apply in the case of a defendant defended by counsel who thoroughly understands the language used by the witnesses (Phipson, *Law of Evidence*, p. 458, and *Reg. v. Jones*, 49 J.P., p. 728).

In the present case, although the language of the prisoner was English, he had retained and was represented at the trial by an advocate whose habitual tongue was French, and he did not ask for a mixed jury, but consented to be tried by a jury of persons who all spoke French. The prisoner and his counsel did not ask to have the evidence of the nine witnesses translated and their evidence was perfectly understood by the twelve jurors and by the prisoner's counsel, who stood in his place for the conduct and management of the trial, and who cross-examined these witnesses in French.

We are of opinion that the defendant was not entitled under the circumstances to have the evidence of these nine witnesses translated, and that no miscarriage was occasioned on the trial by the omission to have it translated. The conviction cannot, therefore, be set aside and quashed by reason of such omission.

The third or last question of law can be disposed of in a few words.

The prisoner was tried on the charge of having murdered a man named Denis Labre, otherwise called Daniel Loubert. The name of the man who was killed was really Denis Labre, but the locality in which he lived was mostly inhabited by people of English, Scotch and Irish birth or descent, by whom he was called Daniel Loubert. At the trial, in order to shew his name and identify him, the prosecution produced in evidence two extracts from the registers of the acts of civil status, one being an extract of the act of his marriage, and the other being an extract of the act of his burial; these extracts were certified by the deputy of the prothonotary who is the legal depositary of the registers, and this certificate rendered such extracts authentic under article 50 of the Civil Code. Then under article 1207

of the Civil Code duly certified extracts from registers of a public character required by law, to be kept by official persons, which includes the registers of acts of civil status, are authentic and make proof of their contents without any evidence of the signature or of the official character of the officer who has certified the same being necessary. The defendant complains that a notice of ten days was not given to him previously to these extracts having been put in evidence, in accordance with the provisions of section 19 of "The Canada Evidence Act, 1893." But the provisions of that section apply to judicial proceedings, to official documents of the Government of Canada, or of Provinces included in the Dominion, to official documents, records and registers of municipal and other corporations, to copies of public books when no statutory provisions exist which renders their contents provable by means of a copy, to entries in books kept by departments of government and to notarial acts, but the provisions of the section do not apply to the registers of acts of civil status. The Evidence Act contains a provision that the laws of evidence in force in any Province shall apply, subject to any contrary enactment of Parliament, to all proceedings taken therein. In the present case, we are of opinion that the certified extracts were admissible under the law of this Province without previous notice to the prisoner. But, besides that, their production was unimportant, and could not tend in any way to prove or disprove the killing; they were produced simply to explain the alias' used in the indictment, but this was really unnecessary, as it was otherwise sufficiently shewn and proved that the deceased usually went by one or the other of the names mentioned in the indictment. Even if the extracts were improperly admitted, no substantial wrong or miscarriage appears to have been occasioned by the production at the trial.

We are of opinion that the contention raised by the prisoner in the third or last question of law is unfounded, and that the conviction cannot be set aside on that account.

We will now examine and consider the second question of law, which raises the only vital matter to be decided by this Court. The prisoner alleges and complains that the prosecution in the examination in chief of some of its witnesses, elicited evidence of facts affecting the character and reputation of the prisoner, which were of a nature to prejudice the jury, and the question of law submitted on that ground for the opinion of the Court of Appeal is whether the Court could admit on the examination in chief of the witnesses for the prosecution evidence that he was a man of bad character, and evidence of antecedents and of criminal acts on his part which are not relevant to the issue in the case.

In criminal cases in general the facts to be proved are the facts in issue, and the facts which are relevant to the issue; in short, the facts in issue are those which are necessary to establish the crime or the defence, and the facts which are relevant to the issue are those which, either directly or indirectly, tend to prove or disprove a fact in issue. All facts which constitute a link in the chain of the proof of the criminal transaction are relevant (Phipson, *Law of Evidence*, p. 49). Generally, in criminal proceedings, the fact that the person accused has a good character is deemed to be relevant, as it raises a doubt and an improbability that he conducted himself as alleged, while the fact that he has a bad character is deemed to be irrelevant, unless evidence of good character has been given, when it is admissible to rebut such evidence by a contrary proof of bad character (Stephen, *Law of Evidence*, 5th ed., p. 66). The prosecution, however, cannot make evidence of bad character part of its original case, as it is not at that stage a fact either in issue or relevant to the issue. The initiative must be taken by the person accused, and then the prosecution is permitted to introduce evidence of bad character in or by way of reply and rebuttal. The general rule precludes evidence of the prisoner's bad disposition or character being given as part of the case for the prosecution, but, on the other hand, the prisoner is always at liberty to call evidence to shew that he has a good character.

and, should he avail himself of his right to offer such evidence, the prosecution is entitled to rebut it by evidence that he does not really possess the character alleged, as it would be unjust that he should have the advantage of a character which in point of fact is undeserved. The evidence offered for the prisoner and that adduced by the prosecution in reply must be of the same description, that is, it must in each case consist of evidence of general reputation only; no evidence on either side is admissible of particular acts of conduct on the part of the prisoner or of the personal opinion of the witness as to the prisoner's disposition, however exceptional may have been his opportunities of observation (Wills on Evidence, p. 59, and Prentice, Criminal Law Procedure, p. 189). If a prisoner cross-examines the witnesses for the prosecution as to his character, he gives evidence (3 Russell on Crimes, 4th ed., p. 300. Therefore, if on cross-examination of a witness for the prosecution a statement is elicited that the prisoner has borne a good character, evidence may then be given of bad character, just the same as if witnesses to character had been called on his behalf: *Reg. v. Gadbury*, 8 C. & P., p. 676.

It may, however, be asked whether the illegality of admitting evidence of bad character and of particular acts of misconduct tending to shew bad character as part of the case of the prosecution, is not covered by the omission on the part of the prisoner to object to its admission, and by the fact that he cross-examined the witnesses on their statements? It is the function of the judge who presides at the trial of a criminal case to conduct and regulate the proceedings, to decide upon the competency of the witnesses called, to see that only legal evidence is given, and to explain the law to the jury. The judge should therefore preclude, of his own motion, any illegal evidence which the parties may endeavour to lay before the jury. But where evidence has been improperly received, through oversight or inadvertence, without objection having been taken to its reception, the question as to the legality of such evidence can be submitted to the Court of Appeal under section 743 of the

Criminal Code, which provides that the Court before which any accused person is tried may, either during or after the trial, reserve any question of law arising on the trial and state the same in a case for the consideration of the Court of Appeal. It has been held in England that this can be done whether the prisoner was defended or not; and whether he or his counsel objected or not. If a case has been stated, either on the reservation of the question of law by the trial Court or on leave to appeal, and it appears that evidence was improperly received, the conviction will be set aside, notwithstanding that there was sufficient evidence, without that in dispute, to warrant the conviction. But where, however, the jury have been directed by the judge to disregard the inadmissible evidence, the conviction will not be disturbed when there is sufficient evidence, apart from that irregularly and improperly given, to warrant the conviction (Phipson, *Law of Evidence*, p. 11).

In the case of *The Queen v. Gibson*, 18 Q.B.D. 537, it was held on the 8th March, 1887, by the Court for Crown Cases Reserved, that if any evidence not legally admissible against the prisoner is left to the jury and they find him guilty, the conviction is bad, and this notwithstanding that there was other evidence before them properly admitted and sufficient to warrant a conviction. This was held although counsel for the prisoner had not raised any objection to the illegal evidence when it was given, inasmuch as such evidence could not be allowed to prejudice the prisoner in a criminal case. In this case Lord Coleridge and Justices Mathew and Wills said:—Lord Coleridge: The verdict is vitiated by reason of illegal evidence having been left to the jury. It is the duty of the judge in criminal trials to take care that the verdict of the jury is not founded upon any evidence except that which the law allows, and no evidence which is at law inadmissible should be allowed to go to the jury. Mathew, J.: It is the duty of the judge to warn the jury not to act upon evidence which is not legal evidence against the prisoner. Wills, J.: If a mistake has been made by counsel (as, for instance, omitting to object to illegal

evidence), that would not relieve the judge from the duty to see that proper evidence only is before the jury. (18 Q.B.D. 537.)

We must now examine the evidence which is objected to as having been improperly received, and which is set forth in the supplementary case submitted to this Court by the judge who presided at the trial, and apply to it the principles which I have just mentioned.

The first witness who gave evidence respecting the prisoner's misconduct is Andrew Philps. On the 15th April last (1902), on the examination in chief made by the prosecution on making its case, he gave evidence respecting the burning of the prisoner's house, which occurred on the 7th December, 1900, nine months before the date on which Denis Labre, alias Daniel Loubert, was killed, which clearly implied that the prisoner had set fire to his house and that he was an incendiary. No evidence of good character had then been given, and the inquiry was not as to general reputation, but as to particular acts which implied bad character. No objection was made, however, and the prisoner's counsel cross-examined the witness on the facts mentioned by him.

The second witness is James Davidson, and on the 19th April last, on this examination in chief by the prosecution on its original case, he stated that the prisoner's house had been burned down, and that he had separated from his wife, and was not living with her when the murder of which he is accused had occurred. No evidence of good character had then been given.

The third witness is Alexander Vass, who was examined for the prosecution on the 21st April last, and who on his examination in chief stated that the prisoner's house had been burned down, and that it was rumored and was the general impression, that he was somewhat the cause of the fire. This deposition was given before any attempt to prove good character had been made.

The fourth witness is Thomas Rowley, who was also examined for the prosecution on the 21st April last, and who on his examination in chief swore that the prisoner was a dangerous man, that he was afraid of him, and that he would leave Dundee if the prisoner was let loose and returned to live there, that it was well known that the prisoner wanted to get rid of his wife and family, and that he had got rid of them by the burning of his house, that he was ugly to his wife and children, and had beaten them, and that he had fired a gun at a man called McMaster seven or eight years ago, who went away on that account. No evidence of good character had then been given.

After that, on the 22nd and 23rd April last, William F. Norris, Neil C. Smith, William Amlot, George S. Miller and William D. McCallum, who were called as witnesses for the prosecution, were cross-examined on behalf of the prisoner as to his good character. Then, on the 24th April last, James Arnold and Samuel Barrington were examined for the prosecution, and were questioned as to particular acts of misconduct on the part of the prisoner.

The evidence respecting the acts of misconduct on the part of the prisoner, and reflecting on his character, which was given before the prisoner made evidence of good character by cross-examining the witnesses for the prosecution, and thus opening the door to permit the prosecution to prove in reply that he did not deserve it, is certainly irregular, improper and illegal, and should not then have been allowed and received, although no objection to it was made at the time it was given by the prisoner's counsel, and the evidence given by James Arnold and Samuel Barrington is also clearly irregular, improper and illegal, because, instead of being restricted to the proving by general reputation that the prisoner's character was bad, they were allowed to mention particular acts of misconduct on his part and to state various circumstances tending to raise suspicion as to his character. Then the jurors were not warned and directed by the judge to disregard and not to act upon this evidence, which was not legal evidence against the prisoner.

Such being the case, we are of opinion that all this evidence on the part of the prosecution was improperly received, that it was of a nature to prejudice the minds of the jurors, and that the verdict rendered in this case on the 28th April last (1902), finding the prisoner guilty of the murder of Denis Labre, alias Daniel Loubert, must be set aside and quashed, and it must be directed that a new trial take place.

It is therefore adjudged and ordered that the verdict rendered on the 28th April last (1902), finding the prisoner William Long guilty of the murder of Denis Labre, alias Daniel Loubert, be set aside and quashed, and that the prisoner be again put upon his trial on the indictment found against him, charging him with the murder of Denis Labre, alias Daniel Loubert, and that a new trial take place in due course, before a new jury to be empanelled and sworn according to law.

New trial ordered.

Thomas Brossoit, K.C., for the Crown.

Alphonse Primeau, for the defendant.

Note: *Evidence of prisoner's character—Admissibility.*

Evidence of character can only be as to general reputation. *R. v. Rowton* (1865), 10 Cox C.C. 25; *R. v. Triganzie* (1888), 15 Ont. R. 294.

Where evidence is adduced on behalf of the accused as to his general good character, the witness may be cross-examined by the prosecution as to the grounds of their belief and as to the particular facts on the question of character of which they have knowledge. *R. v. Barsalou* (No. 2) (1901), 4 Can. Cr. Cas. 347. This course however is not usual. Phipson Evid. p. 156.

Evidence to character must be evidence to general character in the sense of reputation; evidence of particular facts, although they might go far more strongly than the evidence of general reputation to establish that the disposition and tendency of the man's mind was such as to render him incapable of the act with which he stands charged, must be put out of consideration altogether. Rebutting evidence to meet evidence of character brought forward by the prisoner must be of the same character and kept within the same limits. While you can give evidence of general good character, the evidence called to rebut it must be evidence of the same general description, shewing that the evidence which has been given to establish a good reputation on the one hand is not true because the man's

Note:—Continued.

general reputation was bad. Per Cockburn, C.J., in *R. v. Rowton* (1865), L. & C. 520; 10 Cox C.C. 25; *R. v. Triganzie* (1888), 15 O.R. 294.

Except in rebuttal to evidence of good character, it is not competent to give evidence of a prisoner's bad character, or the bad character of his associates, as that does not in any manner tend to establish the particular offence for which the prisoner is being tried. But if the conduct or character of his associates has a bearing upon the particular charge forming a link, near or remote, in the chain that connects the accused with the offence, it may be admissible in evidence. Per Cameron, C.J., in *R. v. Bent* (1886), 10 O.R. 557.

Evidence of the general character of the prisoner, or of the party on whom the crime is alleged to have been committed, is tendered for the purpose of raising a presumption of innocence or guilt. Formerly, evidence of the prisoner's good character was held to be admissible, *in favorem vitae*, in capital cases only. *Rex v. Harris*, 2 State Trials, 1038. But now such evidence is admitted in all criminal prosecutions. "I cannot, in principle," said Mr. Justice Patteson, "make any distinction between evidence of facts and evidence of character. The latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty. The object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case." *Rex v. Stannard*, 7 Carrington & Payne, 673.

But this species of evidence is confined exclusively to criminal proceedings; and so strict is the rule, that on the trial of an information filed in the Exchequer by the Attorney-General, for keeping false weights, and for offering to corrupt an officer, this evidence was rejected by Chief Baron Eyre, who said: "It would be contrary to the true line of distinction to admit it, which is this; that in a direct prosecution for a crime such evidence is admissible, but where the prosecution is not directly for the crime, but for the penalty, as in this information, it is not." *The Attorney-General v. Bowman* (1791), 2 Bosanquet & Puller, 532. note. In *The Attorney-General v. Radloff*, 10 Exchequer Rep. 84; 26 Eng. Law & Eq. Rep. 416, (1854), which was a proceeding in the Court of Exchequer, on the part of the Attorney-General, to recover penalties by means of an information, Martin, B., said: "The proper meaning of 'crime' is an indictable offence. The question has frequently arisen, whether an information at the suit of the Attorney-General for penalties for smuggling, be a criminal proceeding. I believe it has invariably been considered not to be so. One test, and a very obvious one, is, whether, in such a case, the character of the defendant be admissible in evidence. It has been decided that it is not. In criminal cases, evidence of the good character of the accused is most properly, and with good reason, admissible in evi-

Note:—*Continued.*

dence, because there is a fair and just presumption that a person of good character would not commit a crime; but, in civil cases, such evidence is with equal good reason not admitted, because no presumption would fairly arise, in the very great proportion of such cases, from the good character of the defendant, that he did not commit the breach of contract or of civil duty alleged against him. But it is not admissible in such cases as the present, and the reason given is (as indeed it must be), that the proceeding is not a criminal proceeding, but in the nature of a civil one, and that, therefore, the good character of the defendant would afford no just ground of presumption that he had not done the act in respect of which the penalty is imposed."

When the point at issue is, whether the accused has committed a particular act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt; and therefore, in this event alone, will the jury be advised to act upon such evidence. 1 Starkie on Ev. (London ed. 1853), 75.

The inquiry must be confined, except where the intention forms a material ingredient in the offence, to the *general* character of the prisoner, and must not condescend to particular facts; for although the common reputation in which a person is held in society may be undeserved, and the evidence in support of it must, from its very nature, be indefinite, some inference, varying in degree according to circumstances, may still fairly be drawn from it; since it is not probable that a man, who has uniformly sustained a character for honesty or humanity, will forfeit that character by the commission of a dishonest or cruel act. But the mere proof of isolated facts can afford no such presumption. 1 Taylor on Ev. §258. And see *Rea v. Davison*, 31 Howell's State Trials, 187, 217, per Lord Ellenborough. Evidence of character must, of course, be applicable to the nature of the charge; for instance, to prove that a party has borne a good character for humanity and kindness, can have no bearing in reference to a charge of dishonesty. Wills on Cir. Ev. p. 131.

Although the defendant is allowed to introduce this kind of testimony, the prosecutor cannot, in the first instance, have recourse to the same loose testimony, as the means of establishing the guilt of the accused; but if, with the view of raising a presumption of innocence, witnesses to character are called for the defence, the counsel for the government may then give evidence to rebut and counteract this presumption. 1 Taylor on Ev. § 259; *Commonwealth v. Webster*, 5 Cushing, 525; *People v. White*, 14 Wendell, 111; *Bennett v. State*, 8 Humphreys, 118. And if the defendant introduces evidence of his good character prior to the alleged commission of the crime charged, it is competent for the government to prove that, subsequently to that time, his character had been bad. *Commonwealth v. Sacket*, 22 Pickering, 394. Per Curiam: "The defendant having put his character in issue, it was competent for the government to prove that it was not good; but his counsel

Note:—Continued.

contend that the inquiries should have been confined to the period anterior to the supposed commission of the offence charged. We are not aware of any rule to that effect. Evidence of a bad reputation, subsequently acquired, may indeed be of little weight, but still it will have some bearing, as, commonly, the descent from virtue to crime is gradual. We decide that such evidence is competent, but it is to be received with great caution."

In *Commonwealth v. Webster*, 5 Cushing, 324, Chief Justice Shaw, with reference to this kind of evidence, charged the jury as follows: "There are cases of circumstantial evidence, where the testimony adduced for and against a prisoner is nearly balanced, in which a good character may be very important to a man's defence. A stranger, for instance, may be placed under circumstances tending to render him suspected of larceny, or other lesser crime. He may shew that, notwithstanding these suspicious circumstances, he is esteemed to be of perfectly good character for honesty in the community where he is known, and that may be sufficient to exonerate him. But where it is a question of great and atrocious criminality, the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience; it is so manifest that the offence, if perpetrated, must have been influenced by motives not frequently operating upon the human mind; that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade. Against facts strongly proved, good character cannot avail. It is therefore in smaller offences, in such as relate to the actions of daily and common life, as when one is charged with pilfering and stealing, that evidence of a high character for honesty will satisfy a jury that the accused is not likely to yield to so slight a temptation. In such case, where the evidence is doubtful, proof of character may be given with good effect. But still, even with regard to the higher crimes, testimony of good character, though of less avail, is competent evidence to the jury, and a species of evidence which the accused has a right to offer. But it behooves one charged with an atrocious crime like that of murder to prove a high character, and, by strong evidence, to make it counterbalance a strong amount of proof on the part of the prosecution. It is the privilege of the accused to put his character in issue, or not. If he does, and offers evidence of good character, then the prosecution may give evidence to rebut and counteract it. But it is not competent for the government to give in proof the bad character of the defendant, unless he first opens that line of inquiry by evidence of good character."

On a charge of murder, expressions of good will and acts of kindness, on the part of the prisoner towards the deceased, are always considered important evidence, as shewing what was his general disposition towards the deceased, from which the jury may be led to conclude, that his intention could not have been what the charge imputes. 1 Phillips on Ev. 470.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE RITCHIE, J., IN CHAMBERS.

THE KING v. KAVANAGH.

Illegality of sentence—County Court Judge's Criminal Court—Court of Record—Imprisonment longer than is authorized—Habeas corpus improper—Procedure by appeal under Part LII. of Code—Cr. Code, sections 178, 529, 742, 743, 744.

1. Habeas corpus does not lie to correct a sentence of imprisonment passed by a County Court Judge's Criminal Court alleged to be for a time longer than is authorized.
2. The proper mode of procedure is by case reserved or by appeal under Part LII. of the Code.

ARGUED: May 9, 1902.

DECIDED: May 9, 1902.

Motion on the return of a writ of *habeas corpus* issued under the Crown Rules, by order of McDONALD, C.J., in Chambers, for the discharge of the defendant, a prisoner in the common jail at Halifax, N.S., under sentence to Dorchester Penitentiary.

The defendant was on the 6th day of May, A.D., 1902, convicted under Part LIV. of "The Criminal Code, 1892," before His Honour William B. Wallace, Esq., Judge of the County Court Judge's Criminal Court at Halifax, N.S., for "that he, the said Charles Kavanagh, a male person, on the 23rd day of July, A.D., 1901, in the City of Halifax, in shop No. 95 Robie Street, in private, attempted to commit an act of gross indecency with William Henry Johnston, another male person," and was therefor sentenced to imprisonment in the Dorchester Penitentiary, at Dorchester, N.B., for the period of three years.

The application was made on the ground that under the combined operation of sections 178 and 529 of "The Criminal Code," the prisoner could only be sentenced to two years and a half imprisonment, and that, therefore, the conviction was bad as being an excess of jurisdiction.

HALIFAX, May 9, 1902.

A. G. Morrison, for the Attorney-General of Nova Scotia, took the preliminary objection that a *habeas corpus* would not lie to review the conviction and sentence of the County Court Judge's Criminal Court, and cited *Rex v. Burke*, 1 Can. Cr. Cas. 539, and the cases there referred to.

Matthew N. Doyle, for the prisoner, *contra*, cited in answer *Ex parte Stather*, 25 N.B.R. 374; *Rex v. St. Clair*, 27 Ont. A.R. 308; 3 Can. Cr. Cas. 551; *Rex v. Gibson*, 29 O.R. 660; 2 Can. Cr. Cas. 302.

HALIFAX, N.S., May 9, 1902.

RTCHIE, J. (orally): Held that he had no jurisdiction to hear the application, as the County Court Judges' Criminal Courts in Nova Scotia, having been constituted Courts of Record by Acts N.S., 1889, ch. 11 and 52 Vict. (Can.), ch. 47, sec. 5, a conviction by such a Court at Halifax, having general jurisdiction over the subject matter of the offence charged, with the consent of the prisoner, was reviewable only under Part LII. of "The Criminal Code," and could not be made the subject of investigation under the writ of *habeas corpus*.

Application refused.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE ARMOUR, C.J.O., OSLER, MACLENNAN, MOSS, AND
GARROW, J.J.A.

THE KING v. RICE.

Homicide—Constructive murder—Conspiracy—Attempt to effect unlawful escape by force of arms—Evidence of common design—Act which “ought to have been known to be a probable consequence”—Verdict—Variance between pronouncement and formal record assented to—Mistaken reference to two counts in indictment containing only one—Cr. Code secs. 61 (2), 227, 228, 231.

1. Where a package of revolvers was thrown into a carriage in which three prisoners conjointly charged with a crime were being conveyed under lawful arrest and the prisoners all struggled to obtain revolvers, two of them succeeding in doing so, whereupon all of them attempted to effect a forcible escape during which one of the peace officers was shot dead by one of the prisoners but by which of them is unknown, proof that the defendant had one of the revolvers in the melee and had ordered another of the peace officers present to “give up” immediately after another of the prisoners had told the defendant to “give it to him” is, with such facts, sufficient evidence of a conspiracy by the three prisoners for an unlawful purpose, to wit, the escape, and of a common design to use for its accomplishment any amount of violence and force; and a conviction of the defendant for murder is, therefore, proper without proof that he fired the fatal shot.
2. It was proper for the trial Judge to instruct the jury that “where all the parties proceed with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force, that if by reason of such resolution one of the party is guilty of homicide, his companions would be liable to the penalty which he has incurred.”
3. The shooting of the constable by one of the conspirators, in the prosecution of such common purpose was an act which was or ought to have been known to be a probable consequence of prosecuting such purpose, and each of the conspirators become under Cr. Code sec. 61 (2) a party to the homicide.
4. The verdict of the jury in a criminal case must be taken to be that which was recorded by the trial Judge on the back of the indictment and read over to and formally assented to by the jury; and, where the same is in due form, it is immaterial that prior thereto the foreman of the jury on stating their verdict to the Court had erroneously referred to the two propositions submitted in the Judge’s charge as the first and second *count* respectively, and had stated that they disagreed on the first *count* and found the prisoner guilty on the second *count*, there being in fact only one count in the indictment.

ARGUED: April 30, 1902.

DECIDED: May 29, 1902.

Crown case reserved by Chief Justice Falconbridge of the King’s Bench Division of the High Court of Justice.

The prisoner was indicted for the wilful murder of one William Boyd, and was tried at a sittings of the High Court of Justice at the city of Toronto, on the 29th October, 1901, before FALCONBRIDGE, C.J.K.B., and a jury.

The evidence shewed that the prisoner, one Jones, and one Rutledge were being tried at the court of general sessions of the peace for the county of York upon an indictment for burglary, and on the evening of the second day of the trial were being conveyed in a covered cab, with the doors shut and the windows open, from the court house to the common gaol, in the lawful custody of two constables, one Walter Stewart and the said William Boyd; that the said cab going towards the east, the prisoner, Jones, and Rutledge were seated on the hind seat of the cab, the prisoner being on the north side, Rutledge on the south side, and Jones between them, the prisoner being handcuffed by his right hand to the left hand of Jones, and Rutledge being handcuffed by his left hand to the right hand of Jones, the constable Walter Stewart being seated on the front seat of the cab, facing Rutledge, and the constable William Boyd being also seated on the front seat, facing the prisoner; that when the cab reached the corner of Gerrard and Sumach streets, an unknown person threw a parcel containing at least two revolvers, and perhaps three, into the cab, through its south window, and Rutledge and the prisoner at least, and perhaps Jones, having each obtained and armed himself with a revolver, a struggle with the constables ensued, in which the constable William Boyd was shot and killed by one of those whom he had in custody.

Jones and Rutledge died before this trial took place.

The learned Chief Justice in charging the jury said; "I am going to submit to you two propositions. The first and plain issue for you to consider is, whether the hand of the prisoner at the bar fired the fatal shot which undoubtedly deprived William Boyd of his life. If you determine that it was his hand that fired the shot, then you will require to go no further with your investigation of the case, because, as I shall have

presently to explain to you, you will necessarily have to find the prisoner guilty of wilful murder. If you think his was not the hand that fired the fatal shot, if you think there is sufficient doubt, reasonable doubt, give the prisoner the benefit of it; it is his right. Then you will pass to the consideration of the second branch, which I will speak of more fully hereafter."

As to the second branch, the learned Chief Justice said: "The second branch of the case is this: if you find either that the fatal shot was not fired by Rice, or that the question whether he did or did not is so surrounded by doubt that you feel yourselves bound to give him the benefit of it, then you will have to go on further and consider another branch of the subject. I shall ask you, when you return, the specific question: Was the fatal shot fired by the hand of the prisoner at the bar? If you answer that, "yes," that is the end of the case. If you say "no," or you are so much in doubt you cannot say whether he did or not, you will have to consider this: you will have to consider the position of the people. Five men leave the court-yard here in a hack; the three prisoners are on trial for a grave offence; the second day of the trial has been reached, and they are being conveyed in lawful custody to the gaol, there to remain and be brought up to court the following morning. Suddenly, at the place mentioned, the corner of Gerrard and Sumach streets, a man comes along and places a parcel in the hack, which is found to contain at least two revolvers. Now, it is argued on the part of the Crown, that could not have been mere accident, that it could not have been the result of some friend doing this thing without any concert with the prisoners; so, it is claimed, you may find the prisoner guilty of murder although Rutledge or Jones fired the shot. Now, when men go out with a common intent to commit a felony, and in the pursuit of that unlawful purpose death ensues, it may or may not be murder on the part of those who do not actually strike the fatal blow. If three persons go out to commit a felony, and one of them, without the knowledge of the others, puts a pistol in his pocket and commits murder, the other two would not be guilty of it; but

where all the parties proceed with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force, if, by reason of such resolution, one of the party is guilty of homicide, his companions would be liable to the penalty which he has incurred. Now, we must be careful not to push that doctrine too far against the prisoner. I am bound to tell you there is no evidence on which you could convict him of conspiracy up to the time the parcel was placed in the cab; the Crown is bound to prove if such was the case. I will relieve you of that part of it. I will tell you there is no evidence up to that time; there is no evidence of conspiracy or common design up to the moment the parcel is thrown into the cab. Yet if, at that moment, before the shot was fired that killed Boyd, the prisoners resolved to escape from lawful custody that they were in, then each would be responsible for the acts of the other; so that, in that point of view, if you reach that conclusion, then Rice would be deemed to be guilty, even although Jones or Rutledge fired the fatal shot. You will recollect that Stewart swore that soon after the parcel came in he saw a revolver with Rice, and he was told to "give up" or "get out;" that Rutledge said "give it to him;" that Rice said to him to "give up." If that is true, there would be evidence of common design. But, as I have said before, I shall ask you to make a specific finding whether Rice did fire the shot that killed Boyd."

After retiring to consider their verdict, the jury returned into Court, and stated that they wished to know definitely what the learned Chief Justice had said on the subject of conspiracy or collusion; and he then said to them: "I told you, gentlemen, there was no evidence upon which you could find that there was a conspiracy or collusion between the three prisoners up to the time the parcel was placed or thrown into the cab; but, granting there was no evidence of conspiracy or common design up to the moment the parcel was thrown into the cab; yet if, at that moment, or at any time up to the time of the shooting of Boyd, the prisoners resolved to escape from lawful custody

they were in, then each would be responsible for the acts of the other; and, if you find that between the throwing of the parcel and the shooting of Boyd, there was such a resolution, even although Rutledge or Jones fired the shot, the prisoner at the bar can be convicted of murder."

The jury again retired and again returned into Court, when the following took place. The clerk: "Gentlemen, have you agreed on your verdict?" Foreman of jury: "We have." The clerk: "Do you find the prisoner guilty or not guilty?" Foreman of jury: "On the first *count* we disagree." The clerk: "How do you find on the second *count*?" Foreman of jury: "On the second *count* we find the prisoner guilty." His Lordship: "Is there any prospect of your agreeing as to whether he fired the fatal shot or not?" Foreman of the jury: "I think not." And the verdict was recorded, with the consent of the jury given in the usual way, as follows: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd."

The learned Chief Justice reserved for our opinion the following questions:—

1. Was there any sufficient evidence to warrant the verdict as found by the jury?
2. Was my direction to the jury on the question of conspiracy or common design, correct?
3. Was the finding of the jury a proper one, or has there been a mistrial?

TORONTO, April 30, 1902.

T. C. Robinette, for the prisoner. To make each of the three men responsible for the acts of each of the others, there must have been more than a resolution to escape; the three men must have entertained the common purpose of resisting with violence any opposition made to their escape; there could be no common design unless all formed the resolve that all three should escape by violence—an independent resolve to escape on

the part of each for himself was not sufficient ; there is no evidence of a common resolve. [He referred on this branch of the case to the following authorities :—Hawkins P.C., Bk. 1, ch. 13, secs. 51, 52 ; 1 Hale P.C., p. 439 ; 4 Bl. Com. (Lewis), p. 200 ; 1 East P.C. ch. V., sec. 33 ; Foster's Crown Law, pp. 351-3 ; *Rex v. Jackson* (1749), 18 St. Trials 1069 ; *Rex v. Plummer* (1701), Kelyng 109 ; *Mansell and Herbert's Case* (1555), 1 Hale P.C. 441 ; *Rex v. Hodgson* (1730), 1 Leach 6 ; *Tomson's Case* (temp. Car. II.) Kelyng 66 ; *Rex v. Edmeads* (1828), 3 C. & P. 390 ; *Rex v. Collison* (1831), 4 C. & P. 565 ; *Regina v. Howell* (1839), 9 C. & P. 437, 450 ; *Regina v. Lee* (1864), 4 F. & F. 63 ; *Rex v. Hawkins* (1828), 3 C. & P. 392 ; *Rex v. Whitthorne* (1828), *ib.* 394 ; *Duffey and Hunt's Case* (1830), 2 Lewin 194 ; *Macklin's Case* (1838), 1 Lewin 225 ; *Regina v. Price* (1858), 8 Cox 96 ; *Regina v. Franz* (1861), 2 F. & F. 580 ; *Regina v. Luck* (1862), 3 F. & F. 483 ; *Regina v. Caton* (1874), 12 Cox 624 ; *Regina v. Connolly* (1894), 1 Can. Crim. Cas. 468 ; Bishop's Commentaries on the Criminal Law, secs. 629, 636, 637 ; *Regina v. Serné* (1887), 16 Cox 311 ; *Regina v. Horsey* (1862), 3 F. & F. 287 ; *Regina v. Desmond* (1868), 11 Cox 146 ; *Regina v. Greenwood* (1857), 7 Cox 404 ; "Constructive Murder," articles in 33 L.J. (1898), pp. 546, 615 ; Stephen's Digest, 5th ed., p. 32 ; Roscoe's Criminal Evidence, 12th ed., p. 645 ; *Sissinghurst Case* (1674), 1 Hale P.C. 461 ; *Regina v. Tyler* (1838), 8 C. & P. 616.] Then, as to the verdict of the jury. There was only one count in the indictment. The murder count is indivisible. The jury stated that they disagreed on the first count, and found the prisoner guilty on the second count. Evidently, what they had in mind, what they meant, was that they disagreed as to whether the prisoner had committed a major offence, and agreed that he was guilty of a minor offence. When the foreman said that the jury disagreed on the first count, the clerk had no right to ask a second question ; the indictment was indivisible ; the jury could not agree and disagree about it. The verdict was the deliverance of the jury. If it was not entered as it was delivered, the entry was

wrong. There was no power to amend the verdict [He referred on this branch of the case to the following authorities:—*Wills v. Carman* (1888), 14 A.R. 656; *Bush v. McCormack* (1891), 20 O.R. 497; *Stevens v. Grout* (1894), 16 P.R. 210; *Regina v. Virrier* (1840), 12 A. & E. 317; *Rex v. Keat* (1697), 1 Salk. 47; *Bold's Case*, *ib.* 53; *Miller v. Trets* (1697), 1 Ld. Raym. 324; *Rex v. Woodfall* (1770), 5 Burr. 2661; *Regina v. Farnborough* (1895), 18 Cox 191; *O'Connell v. The Queen* (1844), 1 Cox 413; *Campbell v. The Queen* (1847), 2 Cox 463; *Regina v. Yeadon* (1861), 1 Leigh & Cave 81; *Regina v. Johnson* (1865), *ib.* 632; *Regina v. Dudley* (1884), 14 Q.B.D. 273; *Rex v. Curill* (1773), Lofft 156; *Turner and Reader's Case* (1830), 2 Lewin 9; *Rex v. Bear* (1697), 2 Salk. 646; *Regina v. Martin* (1839), 9 C. & P. 213; *Regina v. Mehegan* (1856), 7 Cox 145; *Regina v. Meany* (1862), 1 Leigh & Cave 213; Roscoe's Criminal Evidence, 12th ed., p. 182; *Regina v. Larkin* (1854), Dears, 365; *Regina v. Oliver* (1877), 13 Cox 588.] This is a defective verdict; no judgment can be entered upon it; and there should be a new trial: *State v. Redman* (1864), 17 Iowa 329; *Wright v. State* (1854), 5 Ind. 527; *People v. Olcott* (1801), 2 Johns. Cas. (N.Y.) 301; *Rex v. Huggins* (1730), 2 Ld Raym. 1574; *Rex v. Hazel* (1785), 1 Leach 368; *Regina v. Jackson* (1857), 7 Cox 357; *Regina v. Harrington* (1851), 5 Cox 231.

J. R. Cartwright, K.C., and *Frank Ford*, for the Crown. There is evidence to sustain the verdict. Reading the whole charge, it will be seen that the Judge told the jury just what the prisoner now contends they should have been told; the direction was entirely proper—and favourable to the prisoner. See Foster's Crown Law, pp. 270, 352. There can be no question as to the sufficiency of the verdict; it was not defective; if the finding was informal the verdict was entered according to the meaning of it, and was read over to the jury, who assented to it, and it became their verdict. [They referred on this question to Am. & Eng. Encyc. of Law, 1st ed., tit. "Verdict;"]

Hawks v. Crofton (1758), 2 Burr. 698; *Regina v. Sparrow* (1860), Bell C.C. 298; *Regina v. Crawshaw* (1860), *ib.* 303].

Robinette in reply.

TORONTO, May 29, 1902.

ARMOUR, C.J.O. (after stating the facts as above):—

I am of the opinion that there was sufficient evidence to warrant the verdict as found by the jury; that the direction of the learned Chief Justice to the jury on the question of conspiracy or common design was not one of which the prisoner could complain; that the verdict of the jury was a proper one; and that there was no mistrial.

The law is, that "if several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose:" Criminal Code, sec. 61, sub-sec. 2.

And culpable homicide is murder in the following case: "If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one:" Criminal Code, sec. 227, sub-sec. (d.)

Culpable homicide is also murder in the following case whether the offender means or not death to ensue, or knows or not that death is likely to ensue: If he means to inflict grievous bodily injury for the purpose of facilitating his escape from lawful custody, and death ensues from such injury: Criminal Code, sec. 228 (a.) and sub-sec. 2.

The evidence shewed that immediately upon the parcel containing the revolvers being thrown into the cab the prisoner and Rutledge, at all events, and perhaps Jones, armed themselves with the revolvers and formed the common intention of, by the

use thereof, prosecuting the unlawful purpose of escaping from lawful custody, and of assisting each other therein, and that the shooting by one of them of Boyd was an offence committed by one of them in the prosecution of such common purpose, and that the commission thereof was or ought to have been known to have been a probable consequence of the prosecution of such common purpose. Each of them was, therefore, a party to such offence, and the offence, being murder in the actual perpetrator thereof, was murder in the prisoner, even if he was not the actual perpetrator thereof, and he was properly found guilty by the jury of that offence, the evidence, in my opinion, fully warranting their verdict.

There was nothing, in my opinion, in the charge of the learned Chief Justice, nor in his subsequent instruction to the jury, both of which must be read together, of which the prisoner could properly complain.

The jury in coming into Court, and their foreman saying, "On the first count we disagree," and being asked by the clerk, "How do you find on the second count?" saying, "On the second count we find the prisoner guilty," were obviously referring to the two propositions or branches of the case submitted to them by the learned Chief Justice.

Their verdict must, however, be taken to be the verdict recorded by the learned Chief Justice on the back of the indictment, and acknowledged by the jury to be their verdict, in these words: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd:" *Regina v. Meany*, 1 Leigh & Cave 213.

The finding of the jury was, therefore, a proper one, and there was no mistrial.

The conviction will therefore be affirmed.

OSLER, J.A. :—The prisoner has been found guilty of murder—constructive murder, as it is called— a phrase which has no legal meaning, but is a common and convenient way of describing a homicide committed under circumstances which in law

constitute the offence of murder, though the particular act which occasioned it may not have been actually done or directly authorized by the accused.

The questions reserved by the learned trial Judge are:—

1. Whether there was sufficient evidence to warrant the verdict as found by the jury.
2. Whether his direction to the jury on the question of “conspiracy” or common design was correct.
3. Was the finding of the jury correct, or had there been a mistrial?

I have carefully considered the charge of the learned Judge and the evidence bearing thereon and the proceedings at trial as reported by him for the purpose of and forming part of the case reserved.

The whole of the evidence at the trial, as taken by a stenographer, has been handed in by counsel for the prisoner, but I have not thought it right to refer to it, as no part of it was proposed to be read on the argument, and it is no part of the case returned by the trial Judge, and was not called for or ordered by this Court to be procured or produced for the purpose of the case. There is nothing regularly before us but the case reserved as settled and signed by the Judge, and to that, in dealing with the evidence and questions submitted by him, I confine myself.

No doubt seems to have been raised at the trial but that the shot which killed the unfortunate constable was fired either by the prisoner or by one of his companions. The jury, however, were unable to agree that it was fired by the prisoner himself.

The question then was—the offence being clearly murder in the person who fired the shot, under sec. 227 or 228 of the Code—whether the evidence was sufficient to bring the prisoner within sec. 61 (2) of the Code: “If several persons form a common intention to prosecute *any unlawful purpose*, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or *ought to have been*

known to be a probable consequence of the prosecution of such common purpose."

Sections 227 and 228, so far as they are material, may be referred to:—

Section 227 : "Culpable homicide is murder in each of the following cases : (a.) If the offender means to cause the death of the person killed ; . . . (d) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one."

228 : "Culpable homicide is also murder in each of the following cases, whether the offender means or not death to ensue, or knows or not that death is likely to ensue : (a) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury ; . .

"2. The following are the offences in this section referred to :"—*inter alia*—"escape or rescue from prison or lawful custody."

The unlawful purpose in which it was said that the prisoner and his companions were engaged was that of escaping from lawful custody (sec. 164), or possibly prison-breaking under sec. 161 of the Code : as to which see sec. 3 (u) ; 1 Hale P.C., p. 609 ; Hawkins P.C., Bk. 2, ch. 18, sec. 4.

The Code, in abolishing the useful distinction between felonies and misdemeanours, removes the distinction in the quality of an escape as an offence dependent upon that of the offence for which the prisoner effecting it was confined.

Briefly stated, the evidence shews that the prisoner and his two companions, Rutledge and Jones, were on the day of the commission of the murder undergoing their trial at the general sessions of the peace for the county of York for the offence of burglary, and that, the court having been adjourned and the trial continued until the following day, they were being conveyed back to the county gaol in a cab in the custody of two

county constables, Stewart and Boyd; the constables being seated on the front seat, and the prisoners facing them on the other. The prisoner Jones sat between his fellows, and the three were shackled together, Rice to Jones's left hand, and Rutledge to Jones's right hand. On their way to the gaol a person unknown threw into the cab a parcel which proved to contain at least two revolvers. Rutledge seized one of them, and a struggle began between him and constable Stewart, who sat opposite to him, and the other got into the possession of the prisoner Rice. The struggle in the cab continued, and in the course of it constable Boyd was killed. There was evidence of action on the part of the prisoner Jones in raising himself upwards and forwards from his seat, from which it might be inferred that he was aiding Rutledge to pass a pistol underneath or behind him to Rice. Stewart swore that soon after the parcel came in he saw a revolver with Rice, and he (Stewart) was told to "give up" or "get out;" that Rutledge said "give it to him," and Rice said to him to "give up."

The learned Judge told the jury that if they found that the fatal shot was fired by the prisoner it was unnecessary for them to consider the case further, and then proceeded to explain to them the law on the subject of common intent or design as affecting the prisoner, in case they were unable to agree that his was the hand which actually fired the shot. He told them that when all parties proceed with the intention to commit an unlawful act—*sc.*, to effect their escape from lawful custody—and with the resolution or determination to overcome all opposition by force, if by reason of such resolution one of the party is guilty of homicide, his companions will be liable to the penalty which he has incurred. He warned the jury that the doctrine must not be pushed too far against the prisoner, and told them that there was no evidence of "conspiracy" or common design on the part of the three up to the moment of the parcel being thrown into the cab. "Yet," he added, "if at that moment, before the shot was fired that killed Boyd, the prisoners resolved to escape from the lawful custody they were in,

then each would be responsible for the acts of the other, so that, in that point of view, if you reach that conclusion, then Rice would be deemed to be guilty even although Jones or Rutledge fired the fatal shot."

After the jury had been out for some time, they came into Court and desired to know definitely what had been said on the subject of "conspiracy or collusion," and the learned Judge again directed them in terms much the same as those I have already quoted.

Looking at the charge as a whole, so far as it dealt with the subject, it appears to me that the learned Judge's direction may be upheld.

We find the law thus laid down in Hawkins P.C., Bk. 1, ch. 13, sec. 51: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally to raise tumults and affrays . . . and in so doing happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation." "But," he adds, "in such case the fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled:" sec. 52.

And in Foster's Crown Law, p. 351, sec. 6: "If the fact, *i.e.*, fact amounting to murder, was committed in the prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow. For in combinations of this kind the mortal stroke, though given by one of the party, is considered in the eye of the law, and of sound reason too, as given by every individual present and abetting. The person actually giving the stroke is no more than the hand or instrument by which the others strike."

Ib., sec. 7: "I have, by way of caution, supposed that the murder was committed in prosecution of some unlawful purpose,

some common design, in which the combining parties were united, and for the effecting whereof they had assembled."

Cases which illustrate these propositions are: *Rex v. Edmeads*, 3 C. & P. 390; *Rex v. Hawkins*, *ib.* 392; *Rex v. Collison*, 4 C. & P. 565; *Rex v. Jackson*, 18 St. Trials 1069; *Rex v. Hodgson*, 1 Leach 6; *Regina v. Skeet* (1866), 4 F. & F. 931; *Regina v. Luck*, 3 F. & F. 483. I may also note the celebrated case, to which I referred on the argument, of *Regina v. Martin and others*, the Fenians tried by special commission at Manchester in November, 1867, for the murder of constable Brett in effecting the escape of other Fenians while being conveyed to gaol in his custody. Mellor, J., in charging the jury in that case said: "If several persons agreed to rescue prisoners at any risk, and with any amount of violence and force which might be necessary for the accomplishment of their design, and were armed with deadly weapons likely to enable them to accomplish their design, they were each and all guilty of the crime of wilful murder:" The Times, Nov. 7, 1867.

Section 61 (2) of the Code, which was not referred to at the trial or on the argument before us, I have already quoted; and very close to it is the following passage from Russell on Crimes, 6th ed., vol. 1, pp. 188-9, where the writer, after a discussion of the authorities, says: "It is submitted that the true rule of law is that where several persons engage in the pursuit of a common unlawful object, and one of them does an act which the others ought to have known was not improbable to happen in the course of pursuing such common unlawful object, all are guilty."

The evidence was clear, if the jury believed it, that all three prisoners ascertained, immediately after the parcel was thrown into the cab, that it contained weapons, and, however hopeless it may now seem to have been that persons situated as they were could effect their escape, the evidence is that Rice and Rutledge, Jones aiding and assisting them, did at once proceed to possess themselves of the pistols, and by their language and actions and use of the weapons endeavour to overpower and overawe the constables. That this was done for the common

purpose of effecting their escape, their language and behaviour in the cab indicated. It is not necessary to lay stress on what occurred afterwards, as they were all shackled together, but they all got out of the cab and on to the street car, the control of which Rice and Rutledge attempted to secure. There is no evidence that any one of the three attempted, so far as his shackled condition would permit, or by his language, to dissociate himself from the others. The contrary expressly appears.

The learned counsel for the prisoner pressed upon us that the learned Judge had not sufficiently instructed the jury as to what was necessary to constitute a common purpose or intention, and that there was nothing more than the individual intention on the part of each prisoner arising out of the circumstances of the moment—in other words, that no common design to effect an unlawful purpose was proved. As to this I see nothing wrong or insufficient in the charge. The common design might certainly be formed as soon as the prisoners found that weapons suitable as means of effecting an escape were in their possession; and the evidence, as reported in the case, supports the inference that there was a common design to effect an unlawful purpose by violent means.

It was also urged that the Judge had not laid sufficient stress upon the element of necessity for proof that the prisoners had resolved to incur all risks and to use any amount of violence necessary to accomplish their design—the language which is found in the cases which precede the Code. It would have been more satisfactory if the learned Judge's attention had been called to the 61st section of the Code, and his direction had been framed with reference to its language. There is, however, no formula, and the law is sufficiently expressed, and more favourably to the prisoner, in the phrase which the learned Judge did use, viz., that the jury were to consider whether there was a common resolution to overcome all opposition by force.

On the whole, I am unable to say that there was any error in the charge, or that there was not sufficient evidence to warrant a verdict affixing the guilt of murder on the prisoner Rice, although the shot may have been actually fired by his companion.

The first and second questions must, therefore, be answered in the affirmative.

As regards the third question, I cannot entertain a doubt that the finding of the jury—that is, their finding as entered and assented to by them, which is, I suppose, what is referred to in this question—was correct, and that there has been no mistrial.

The case was left to them in two aspects: first, whether they were satisfied or not upon the evidence that the shot which killed Boyd was fired by the hand of the prisoner. If it was not, or if they could not agree, then they were to deal with the question of common resolution or intention, and if they found that such existed, they might find the prisoner guilty, although he did not fire the shot. When the jury returned into Court with their verdict, and were asked by the clerk the usual question, the foreman answered: "On the first count we disagree." The clerk, continuing the mistake, then asked them: "How do you find on the second count?" To which the foreman replied: "On the second count we find the prisoner guilty." There was only one count; and the verdict was thereupon entered, and assented to by the jury, thus: "The jury find the prisoner guilty. They are unable to agree as to whether the prisoner fired the shot which killed William Boyd."

The language of the jury in first announcing their findings must be construed with reference to the subject-matter of the charge and what was left to them. They evidently meant to dispose of the two subjects which had been presented for their consideration, which they and the clerk erroneously spoke of as "counts." But the mode in which the verdict was actually entered, and the jury's assent to it as entered, cured any inaccuracy of expression which had up to that moment occurred, and nothing now appears upon the record but a verdict in due

form. Had the jury insisted upon adhering to their error, or had the verdict been entered in the way they at first mistakenly announced it, very different considerations might have arisen. As it is, the cases of *Rex v. Woodfall*, 5 Burr. 2661, *Regina v. Virrier*, 12 A. & E. 317, *Regina v. Sparrow*, Bell C.C. 298, and *Regina v. Crawshaw*, Bell C.C. 303, shew that the prisoner has nothing to complain of in this respect, and that there is no irregularity or defect in the proceedings.

The third question must be answered as to the first part thereof in the affirmative, and as to the second in the negative. And, as no legal fault can be found with the conviction, the prisoner's trust must be placed in the justice and clemency of the Crown.

MACLENNAN, MOSS, and GARROW, JJ.A., concurred.

Conviction affirmed.

N.B.: Sentence of death having been pronounced, an application to the Executive for a new trial or commutation of the sentence was afterwards made and refused, and the prisoner was hanged at Toronto in July, 1902, in conformity with the sentence, after an unsuccessful application on behalf of the prisoner for leave to appeal. (See the next case *Rice v. The King*.)

Note: *Taking the verdict.*

When the jury have come to a unanimous determination with respect to their verdict, they return to the box to deliver it. The clerk then calls them over by their names and asks them whether they agree on their verdict, to which they reply in the affirmative. He then addresses them: "How say you, gentlemen of the jury, is the prisoner guilty of the offence whereof he stands indicted, or not guilty." The officer then writes the word "guilty," or "not guilty," as the verdict is, after the words "po. se." on the record; and again addresses the jury: "Harken to your verdict, as the court hath recorded it; you say that A.B. is guilty [or "not guilty"] of the offence whereof he stands indicted, and so you say all." 1 Chitty Cr. Law, 635.

The verdict in all cases of felony and treason was required to be delivered in the presence of the defendant, in open court, and could not be either privily given, or promulgated while he was absent. Co. Lit. 227, b. 3 Inst. 110. And in all cases where the jury are commanded to "look on him," as in larceny, the same rule applies without exception. Co. Lit. 227, b; 3 Inst. 110. In all trials for inferior misdemeanors, however, a

Note:—Continued.

privity verdict may be given, and there is no occasion for the presence of the defendant. Sir T. Raym. 183; 5 Burr. 2667; 1 Vent. 97. And, by consent of the parties, it may be delivered at the house of the judge, even where it is situate beyond the limits of the county in which the trial proceeded. 5 Burr. 2667.

The verdict thus given is either general to the whole of the charge—partial, as to part of it—or special, where the facts of the case alone are found, and the legal inference is referred to the judges. 4 Bla. Comm. 361.

The jury are at liberty to find a general verdict whenever they think fit to do so, including both law and fact of the case submitted to their decision. *R. v. Spence* (1885), 12 U.C.Q.B. 519.

The jury may acquit the defendant of a part, and find him guilty of the residue. Thus they may convict him upon one count of the indictment, and acquit him of the charge contained in another; or upon one part of a count capable of division, and not guilty of the other part, as on a count for composing and publishing a libel, the defendant may be found guilty of publishing only. 2 Camp. 583, 4, 5. And, in general, where from the evidence it appears that the defendant has not been guilty to the extent of the charge specified, he may be found guilty as far as the evidence warrants, and be acquitted as to the residue; as where he is charged with engrossing 1,000 quarters of wheat, and the evidence amounts to but 700 (Hawk. b. 2, c. 26, s. 75); but, if a contract be described, it must be proved as laid, and the jury cannot find a variant contract. Hawk. b. 2, c. 26, s. 75. And where the accusation includes an offence of inferior degree, the jury may discharge the defendant of the higher crime, and convict him of the less atrocious. Thus, upon an indictment for burglariously stealing, the prisoner may be convicted of the theft, and acquitted of the nocturnal entry (1 Leach, 36, 88; 2 East, P.C. 516, 8); upon an indictment of murder, he may be convicted of manslaughter (Hawk. b. 2, c. 47, s. 4); and, on an indictment founded on a statute, the defendant may be found guilty at common law. Hawk. b. 2, c. 46, s. 178.

The only exception to this rule seems to be, where the prisoner, by being originally indicted for a different offence, would be deprived of any advantage which he would otherwise be entitled to claim; in which case the prosecutor is not permitted to oppress the defendant, by altering the mode of proceedings. Where the offence appears from the evidence, to be of a higher degree than is alleged in the indictment, it is in the discretion of the court to discharge the jury, and to direct another indictment to be preferred. Fost. 327, 8, 104.

Where the defendant is found guilty of the charge in general, though all the counts are bad but one, the verdict will be sufficient, and an entire judgment may be given. 2 Stra. 845; 1 Salk. 384; 1 Cowp. 276. But, if a general verdict be given on a count, stating an act which, if it stood by itself, would be punishable criminally, but shows that it was committed

Note:—*Continued.*

under circumstances which rendered it justifiable or excusable, no judgment can be given on any part of the count. 5 East, 304, 308; 2 Burr. 985; Hawk. b. 2, c. 47, s. 8.

Although several are frequently included in the same indictment, yet, as the charge is distinct against each of them, the jury may, on the evidence, acquit some of them and find the others guilty. 2 St. Tr. 526; Harg. edit. Turner's case, 1 Sid. 171; Hawk. b. 2, c. 47, s. 8; 3 T.R. 105, 6. Even where they are all charged with doing the same offence, some of them may be convicted, and others acquitted. 3 T.R. 105; 1 Leach, 360. So where two defendants are charged, one as principal in the first, and the other in the second degree, as being present, aiding and abetting, the latter may be found guilty, though the former is acquitted. 1 Leach, 360. And they may be convicted in different degrees of crime, arising out of the same circumstances: as one of them of murder, and the other of petit treason, on any indictment against both for the latter (Fost. 104); but it has been considered that one of the several defendants cannot be found guilty of burglary, and the others of larceny, where all are accused of the former. 2 Harg. St. Tr. 526; 1 Sid. 171; Hawk. b. 2, c. 47, s. 8; see 2 East, P.C. 521. And where the charge is of such a nature, that one, as in case of conspiracy, or two, in that of riot, cannot be guilty without the union of others, if all the rest are acquitted, and the indictment does not charge the offence to have been perpetrated in company with any persons unknown, the verdict of guilty must be altogether repugnant and invalid. Poph. 202; 3 Burr. 1262; 12 Mod. 262; 2 Salk. 593; Hawk. b. 2, c. 47, s. 8; Stra. 193, 1227. But where one is indicted for a conspiracy, or two for a riot, with others, the conviction will be valid, though they never come in to be tried, or die before the time of trial. 1 Stra. 193; 12 Mod. 212; 2 Stra. 1227; 3 Burr. 1262; Hawk. b. 2, c. 47, s. 8, n. (1). If an accessory be indicted at the same time with the principal, if the latter be acquitted, the former must also be acquitted, since his guilt is entirely inconsistent with the innocence of him who is charged as principal. Stark. 332, 3.

It is the common practice, in the case of a conviction of manslaughter, on a charge of murder, to say "not guilty of murder, but guilty of manslaughter," though the latter is included in the former. Stark. 332. And the minute on the record is a mere memorandum for the future guidance of the officer, and must be taken altogether, to ascertain the meaning of the jury. 2 East, P.C. 518.

The jury have a right, in all cases whatsoever, whether capital or otherwise to find a *special* verdict, by which the facts of the case are put on the record, and the law is submitted to the judges. 1 Bulst. 87; 9 Co. 12 b. 63; Hawk. b. 2, c. 47, s. 3.

No particular form of words is, however, necessary to be followed with technical exactness. 1 Dougl. 211. It must positively state the facts themselves, and not merely the evidence adduced to prove them. 1 Wils.

56; 4 Burr. 2077; Kel. 78, 9; Hawk. b. 2, c. 47, s. 9. And all the circumstances constituting the offence, must be found, in order to enable the court to give judgment. 2 Stra. 1015. For the court cannot supply a defect in the statement made by the jury on the record, by any intentment or implication whatsoever. Com. Rep. 480; 2 East, P.C. 708, 784.

It is sufficient, if the jury find all the substantial requisites of the charge, without following the technical language used in the indictment; as where a defendant is charged with forging and counterfeiting a bank note, and the jury state that he erased and altered it by changing the word "two" into "five," this was held to be a sufficient description of the offence. 1 Stra. 19.

Though a verdict cannot be amended in matters of *fact*, yet the court may amend a mere error in form, even in capital cases, where there are any notes or minutes by which it can be amended. 5 Burr. 2663; 1 Leach, 383; 1 Stra. 515; 2 Stra. 844; 1 Dougl. 375, in notes; Hawk. b. 2, c. 47, s. 9.

If the jury, through mistake, or evident partiality, deliver an improper verdict, the court may, before it is recorded, desire them to reconsider it, and recommend an alteration. 1 And. 104; Alleyn, 12; Plowd. 211, b.; 2 Hale, 299, 300, 310; Hawk. b. 2, c. 47, s. 11; Bac. Abr. Verdict, G. Thus, where the decision is repugnant, as if they found one guilty alone of a conspiracy, and acquit the other, they will, on explanation that they cannot find that one person alone was guilty of a conspiracy, withdraw, and may, on reconsideration, find both the defendants guilty. Bro. Abr. Jurors, 7; Bac. Abr. Verdict, G. But it is considered as bearing too hard on the prisoner, and has been seldom done in modern times, when the decision is in his favor. Hawk. b. 2, c. 47, s. 11, 12; but see 2 Hale, 310; And. 104; Alleyn, 12; 2 Harg. St. Tr. 26; Crompt. 114. The jury may also themselves rectify their verdict in the same stage of the proceedings, and it will stand as ultimately amended. Co. Lit. 227, b.; 2 Hale, 299, 300; Bac. Abr. Verdict, G.; Plowd. 211. Though they can neither be directed nor allowed to make any alteration, after the verdict is recorded (Co. Lit. 227, b.; 2 Hale, 300; Hawk. b. 2, c. 47, s. 11; Bac. Abr. Verdict, G.; unless, indeed, the mistake appear and be corrected promptly. 1 Ry. & Mo. C.C. 45. A general, like a special verdict, may be amended in matter of form, though not in any substantial degree. 5 Burr. 2663; Dougl. 375.

[SUPREME COURT OF CANADA.]

BEFORE SIR HENRY STRONG, C.J., AND TASCHEREAU, SEDGEWICK,
DAVIES AND MILLS, JJ.

RICE v. THE KING.

Criminal appeal—Appeal to Supreme Court of Canada—Unanimous affirmance of conviction by Court of Appeal—No power to grant leave—Stat. Can. 60-61 Vict., c. 34—Cr. Code sec. 750.

1. An appeal to the Supreme Court of Canada from the decision of a Court of Appeal on a case reserved at the trial is governed by sec. 750 of the Criminal Code without regard to the Statute of 1897, 60-61 Vict. (Can.) c. 34., respecting leave to appeal from the Ontario Court of Appeal, and the latter statute does not apply to criminal appeals.

DECIDED: June 11, 1902.

MOTION for special leave to appeal from the judgment of the Court of Appeal for Ontario, *ante* p. 509, affirming the conviction of the appellant for murder.

As the judges of the Court of Appeal were unanimous in affirming the conviction there could be no appeal to the Supreme Court under the provisions of the Criminal Code. Counsel for the prisoner claimed, however, that 60 & 61 Vict. ch. 34, overruled the Code, so far as appeals from the Court of Appeal of Ontario were concerned, and that the Supreme Court of Canada could grant special leave under the latter statute.

Robinette, K.C., for the motion.

Cartwright, K.C., Deputy-Attorney-General for Ontario, and *Guthrie*, K.C., contra.

OTTAWA, June 11, 1902.

The judgment of the Court was delivered by

STRONG, C.J., (oral).—In the case of *The Union Colliery Co. v. The Queen*, 31 Can. S.C.R. 81, 4 Can. Cr. Cas. 400, it was held that under section 750 of the Criminal Code an appeal will

lie from the judgment of the Court of Appeal on a reserved case provided there was a dissenting judgment. The question therefore is whether the plain provisions of the Code, which require a dissent in the Court of Appeal to give jurisdiction to this Court, are no longer in force so that an appeal may now be entertained where there is no dissent. The only possible ground on which this can be rested is subsection (e) of 60 & 61 Vict. c. 34, sec. 1, passed in 1897, in which it was enacted that the provisions of a statute, itself *ultra vires*, previously passed by the Ontario Legislature, should be confirmed. The Act in its preamble states that its object is to confirm or to re-enact the inefficacious Ontario Act referred to. We have a right therefore to turn to the latter Act. When we do so we find that, on its face, it is confined to civil cases and does not attempt to interfere with criminal appeals. It was *ultra vires* because the Ontario Legislature had no jurisdiction to pass an Act regulating appeals to this court, but if it had professed to deal with criminal cases, it would have been *ultra vires* on that ground also.

It is therefore plain beyond all doubt that the sub-section referred to, which authorizes this court as well as the Court of Appeal to grant leave to appeal in certain cases, does not in any way apply to criminal cases.

We have therefore section 743 of the Criminal Code, which gives an appeal from the judgment on a reserved case, standing uninterfered with by any subsequent Dominion legislation.

Then, how can we grant this application? Not only is there no jurisdiction conferred upon us in criminal cases, where the court appealed from is unanimous, but we are expressly prohibited from interfering under such conditions. It is therefore plain that it is not within the competence of this court to entertain an appeal by the prisoner.

The motion must be refused.

Motion refused.

[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., IN CHAMBERS.

THE KING v. O'HEARON (No. 2).

Arrest under warrant of commitment—Temporary release of prisoner from the officer's custody—Promise of prisoner to surrender himself—Re-arrest under same warrant valid.

1. Where the officer executing a warrant of commitment releases the prisoner, at his request, for a temporary period, on his promise to surrender himself, such does not constitute a voluntary abandonment of the arrest, and a re-arrest is justified upon the same warrant.

ARGUED: April 30, 1901.

DECIDED: May 10, 1901.

Motion in Chambers under Chapter 181 of the Revised Statutes, 1900, "Of Securing the Liberty of the Subject," on the return of a *habeas corpus* for the discharge from custody of the defendant, Timothy O'Hearon, a prisoner in the common jail at Amherst, in the County of Cumberland, under a warrant of commitment signed by the Stipendiary Magistrate for the Town of Amherst, in the county aforesaid, and reciting a conviction of the defendant before that officer on the 24th of September, 1900, for a third offence against the second part of the Canada Temperance Act, under which he was, by the said warrant, directed to be imprisoned for one calendar month.

It appeared from the affidavits used in support of the motion that when the defendant was first arrested on April 4th, 1901, by a police constable under the said warrant of commitment, he requested that officer to allow him to spend Easter Sunday (being the following Sunday), at home; that the officer then allowed him to go out of his custody without any arrangement as to his returning into his custody, or without anything further being done in the matter, and the same officer on the 17th day of the same month again arrested him under the same warrant and lodged him in jail at Amherst.

It was contended on behalf of the prisoner that under these circumstances the release of the defendant by the constable on the 4th of April aforesaid was voluntary, and that his subsequent arrest and imprisonment by the same officer under the same warrant was therefore illegal.

The affidavits filed by the prosecution disclosed that the constable first arrested the prisoner at 12 o'clock noon of the 4th of April; that he requested the officer to give him some time to fix up some business which he said would take him some hours to transact; that the constable, on the defendant giving him his word of honour that he would not attempt to escape, permitted him to go at large for a few hours to fix up his business, under promise that he would meet the constable at 11 o'clock in the evening of the same day and surrender himself into custody and undergo the imprisonment awarded against him; that about 10.30 in the evening of the same day the prisoner met the constable on one of the streets of Amherst, and said he was ready to go to jail then; that both started down for the jail, when the prisoner said to the officer, "Hold on a minute, I want to go to the shop for something"; that the prisoner promised to be right back, and that the officer sat down on the jail steps and waited for him until after 11 o'clock, and he did not return; and that the prisoner, after going into the shop, went out through a back door and jumped on a special train that happened to be passing through Amherst, and went to the United States, returning to Amherst on the 17th of April, when he was arrested under the same warrant and placed in custody.

HALIFAX, April 30, 1901.

J. A. Chisholm, for the prisoner.

W. A. Henry, for the prosecutor.

HALIFAX, May 10, 1901.

MCDONALD, C.J.:—This is an application on *habeas corpus* to discharge the defendant from custody on the ground that the

applicant is illegally imprisoned. The facts as sworn to are as follows:—The prisoner had been arrested at Amherst under a warrant by one of the police of that town, after his arrest he escaped and left the town for some weeks; when he returned he was re-arrested under the same warrant. The rule as to re-arrest in such cases is thus stated in Archbold's Criminal Pleading and Evidence, 22nd edition, page 852, where it is said: "In criminal cases, where a prisoner escapes, if the escape be negligent merely, the gaoler or officer may retake him, at any time, without warrant (Dalt. c. 169); if voluntary, he cannot afterwards be retaken by virtue of the same warrant under which he was at first arrested (2 Hawk., c. 14, s. 9); but he may be retaken on a fresh warrant or without a warrant in cases where he might have been arrested without a warrant originally." And in Paley on Convictions, 7th edition, at page 281, it is said that "if the offender be apprehended and suffered to go at large, upon an offer to find security, which is not fulfilled, it seems that he may be apprehended again upon the same warrant."

On reading the affidavits in the case I have arrived at the conclusion that at the most the escape in this case was negligence on the part of the officer, and that he did not contemplate a voluntary abandonment of his prisoner, but negligently by trusting to his promise to surrender himself under the warrant, and I therefore think he may be re-arrested.

The application will therefore be dismissed.

Application dismissed.

[SUPERIOR COURT OF THE PROVINCE OF QUEBEC.]

BEFORE LYNCH, J.

DAIGNEAULT v. EMERSON ET AL.

Prohibition—Justices of the peace—Disqualification—Interest—Membership in temperance alliance—Canada Temperance Act.

1. Justices of the peace, who belong to an association (a temperance alliance) of which the president is the party prosecuting, and to which association any fine to be imposed upon the accused for the offence against the liquor law with which he is charged would be paid under resolution of the municipal council, are disqualified from trying the charge, and will be prevented by a writ of prohibition from so doing.
2. The fact that between the time when the information was received by such justices and the hearing of the charge, the justices had withdrawn from the association does not validate the proceedings.

SWEETSBURG, October 10th, 1898.

LYNCH, J.:—On the 25th of July, 1898, at Sutton, in the District of Bedford, a complaint was made by the *mis en cause* Smith against the plaintiff Daigneault, wherein it was charged that he had unlawfully sold intoxicating liquors, contrary to the provisions of the second part of the Canada Temperance Act, commonly called the Scott Act, then in force in the County of Brome, where the parties resided.

The said complaint had been received before the defendants Emerson and Lafleur, two justices of the peace for the said district, who issued their warrant accordingly; and plaintiff appeared before them on the 8th of August, 1898, for his trial, as well personally as with the assistance of counsel. He denied the charge generally; furthermore, he offered verbally and in writing a special plea whereby he objected to the jurisdiction of the said two justices of the peace to try and adjudicate upon said charge, and to act generally in the matter, alleging in effect the following grounds or reasons.

Plaintiff pretended and submitted: That by order in council of the Dominion of Canada passed on the 15th of September, 1896, and duly published in *The Canada Gazette*, it was provided that all the penalties under said "Canada Temperance Act"

should be paid to the city, town or county in which said Act was in force, and that, therefore, all fines that might be imposed in the County of Brome would be due and payable to the corporation of the County of Brome, and become its property, for the purposes of the said Act; that the council of the corporation of the County of Brome, by resolution of date the 8th of June, 1898, has decided that all fines which might be imposed under said Act, in and for the said County of Brome, under prosecutions taken by or on behalf of the Brome County Branch of the Dominion Temperance Alliance, to wit, the branch, society, or alliance, in and for the County of Brome, of the temperance organization of the Dominion of Canada, to be paid to the Treasurer of the said county branch of the said Temperance Alliance, upon the order of the President and the Secretary thereof; that the said Brome County branch of the said Temperance Alliance, by resolution duly passed, engaged the services of the *mis en cause* W. W. Smith, at a salary of \$50 per month, to prosecute all parties who should contravene the said "Canada Temperance Act," as its public and professional prosecutor; that the said *mis en cause* was the President of the said Brome County branch of the said Temperance Alliance, and that the said justices of the peace before whom said complaint was made, by whom said summons was issued, and who presided at the session of the Court which tried the said case, were either officers or members of the said branch of the said Temperance Alliance; that all the members and officers of the said branch of the Temperance Alliance, including the said justices of the peace, were interested in all the prosecutions made by or on behalf of the said branch of the Temperance Alliance, not only from a sentimental or moral point of view, but also because the fines which might be imposed in the County of Brome, for the contravention of the said "Canada Temperance Act," would belong to the said Brome County branch of the Temperance Alliance.

Upon the justices ordering the case to proceed, plaintiff made proof of the foregoing facts, and asked that the complaint be dismissed. But the justices of the peace overruled the objection

concerning their jurisdiction, and adjudicating upon the merits of the case, condemned the plaintiff to a fine of \$100 and the costs, and in default of payment to imprisonment for two months.

Plaintiff then made application for a writ of prohibition, which was granted. Defendants simply resisted the application and the maintenance of the writ.

After having heard the arguments of both parties, the Court ordered the issue of a peremptory writ by the following judgment:—

“Seeing that plaintiff is proceeding by means of a writ of prohibition, authorized to be issued by the judge presiding over said Court on the 24th of August last, for the purpose of restraining the defendants from proceeding to execute a judgment or conviction rendered and pronounced by them while presiding over and holding a Court of Special Sessions of the Peace for said district, at the Village of Sutton, on the 8th of August last, in a certain matter wherein the said *mis en cause* was complainant and the said plaintiff was respondent, on a complaint to the effect that the plaintiff had, on the 30th of June last, at the Village of Eastman, in the County of Brome, in said district, unlawfully sold intoxicating liquors, contrary to the provisions of the second part of the Canada Temperance Act, then in force in said county;

“Considering that plaintiff has alleged and established that before said Court of Special Sessions of the Peace, he pleaded and put in issue that the *mis en cause* was the President and specially authorized agent and prosecutor of the Brome County branch of the Dominion Temperance Alliance, which branch was the real complainant and prosecutor in the matter; and that inasmuch as the defendants were members of said branch, they were incompetent and disqualified as justices of the peace to hear and determine said complaint;

“Considering that it appears that said branch Alliance was interested in the penalties recoverable under the said Temperance Act; and further that defendants were members of that branch

at the time when said complaint was made before them, and when they issued the summons based thereon to plaintiff, but that they had, prior to the said 8th of August last, to wit, on the 30th of July preceding, written to the *mis en cause*, as President of the branch, requesting him to have their names erased as members;

“Considering that plaintiff has established the principal allegations of his declaration, and that defendants have not contested the same;

“Considering that although defendants were not personally interested in the said complaint or prosecution, yet the relations which existed between the said branch, of which they were members, and the complainant, were of a nature to create a bias in their minds in favour of complainant, sufficient to disqualify them, and that, in consequence, they had not jurisdiction to receive the said complaint and to hear and determine the same;

“Doth in consequence order the issue of a peremptory writ commanding the defendants and the *mis en cause* to discontinue all proceedings in the matter of the said conviction against the plaintiff, the whole with costs against the defendants.

Order for prohibition.

J. C. McCorkill, K.C., for plaintiff.

T. Amyrauld, K.C., for defendants, and *mis en cause*.

[COURT OF APPEAL FOR ONTARIO.]

BEFORE THE HONOURABLE MR. JUSTICE OSLER, IN CHAMBERS.

RE WATTS.

Extradition—Convention between Great Britain and the U.S.A.—Commitment for extradition—Bail pending habeas corpus—Remand—Renewing bail pending appeal—Propriety of bail in extradition.

1. Under ordinary circumstances bail should not be granted to a person committed for extradition.
2. Where bail was granted to the accused in extradition proceedings pending a habeas corpus application on his behalf, and afterwards the application for his discharge under habeas corpus was refused, the accused must surrender himself into close custody before a fresh application will be entertained to bail him pending an appeal from the order refusing his discharge.

ARGUED: February 17, 1902.

DECIDED: February 17, 1902.

APPLICATION on behalf of a person committed for extradition to the United States, to admit him to bail, pending an appeal from an order of a judge of the High Court of Justice, refusing to discharge him under a *habeas corpus*.

F. A. Anglin, for the application cited *The King v. Bethel* (1701), 5 Mod. 19 at p. 22.

Shepley, K.C., shewed cause.

TORONTO, February 17, 1902.

OSLER, J.A.:—The accused was committed for extradition for an offence, which may be called child stealing, something like that which is provided for by section 284 of our Criminal Code.

He was brought before Street, J., on a writ of *habeas corpus*. Street, J., refused to discharge him, [*ante*, p. 246], and he now stands remanded for extradition.

Pending the *habeas corpus* proceedings, accused obtained from Britton, J., an order admitting him to bail, the condition of the recognizance being that in the event of his being remanded for extradition by a Judge of the High Court, he should forth-

with surrender himself to the keeper of the common gaol of the County of Essex.

He has now appealed to this Court under section 6 of the Habeas Corpus Act, R.S.O. 1897, ch. 83, and Mr. Anglin applies on his behalf for an order to admit him to bail pending the appeal.

I do not see my way to make the order, for: (1) It does not appear that he is in actual custody; (2) I doubt of my power as a single judge of the Court of Appeal to make it. The appeal is by statute to the Court, and I do not regard a matter of bail as one incidental to the appeal and so capable of being dealt with by a single judge under section 54 of the Ontario Judicature Act.

In the Court below a single judge had jurisdiction in *habeas corpus*, and therefore in the matter of bail, if it was right to grant bail at all, which I am not now concerned to deny.

These grounds are sufficient to prevent me from entertaining the application, but, regarding the question as one of discretion, I should be very slow to admit to bail a person who has been arrested or committed for extradition. I cannot recall an instance of its having been done, though possibly a search, had I the time to make it, might shew that it is not absolutely without precedent.

The Court will meet as soon as possible to hear the appeal, and upon the power of the Court to admit to bail, *de die in diem*, should they think proper to do, I do not for a moment reflect.

Bail refused.

N.B.—The appeal came on to be heard before the full Court on the 19th February. The appellant was not in Court, and it appeared that he was not in custody, not having surrendered himself in pursuance of the order of Britton, J. The Court declined to hear the appeal until he should have done so, and in the result the appeal was not further prosecuted.

Note: *Extradition—Bail—Prosecution for other offences.*

Mr. Hawley in his work on *International Extradition* (Chicago, 1893) says:—

Note:—*Continued.*

"Bail has been allowed in a case of inter-state extradition; *Roberts v. Reilly*, 116 U.S. 80; and no reason is perceived why it ought not to be allowed in cases of international extradition as well. The reasons which govern in one case apply with equal force to the other."

But it seems that no bail can be taken pending a hearing before the extradition commissioner. *Re Carrier* (1893), 57 Fed. 578.

Article 3 of the Extradition Convention of 1889 between the United States and Great Britain provides that no person surrendered by either of the parties shall be triable or tried for any offence committed prior to his extradition, other than the offence for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered. Article 5275 of the Revised Statutes of the United States authorizes and requires the United States authorities to protect all persons surrendered by any foreign government for trial, until the conclusion of their trial and their final discharge from custody or imprisonment, and for a reasonable time thereafter. These sections are construed together in the United States, and it has been there held that a person surrendered by the Canadian authorities on a requisition from the United States cannot be arrested and held for a different offence committed prior to his extradition, until the charge on which he was surrendered has been finally disposed of, although after having been admitted to bail on such charge he may have returned to Canada, as until his final discharge he is in the custody either of the authorities or of his bail. *Cosgrove v. Whinney*, 174 U.S. 64. The exemption is not waived by giving bail on the second arrest. *Bacharach v. Lagrave*, 47 How. Pr. 385.

A person extradited to the United States under the treaty with Great Britain charged with assault with intent to commit murder, cannot be convicted on the trial following such extradition proceedings of an assault with intent to do great bodily harm. *People v. Stout* (Sup.) 30 N.Y. Supp. 898; *People v. Hannan*, 30 N.Y. Supp. 370, affirmed 144 N.Y. 699, 39 N.E. Rep. 858 (1895).

So long as the prisoner is tried upon the facts which appeared in evidence before the commissioner who committed him for extradition and upon one of the charges upon which he was surrendered, it is immaterial whether he is indicted on all of such charges or not. *Ex. p. Bryant*, 167 U.S. 104.

[SUPREME COURT OF NEW BRUNSWICK.]

BEFORE GREGORY, J., SITTING AS AN EXTRADITION JUDGE.

RE KELLY.

Extradition—Assault with intent to commit murder—Proof of intent—Evidence must justify committal for trial for the extradition crime—Extradition Act, R.S.C. 1886, ch. 142, sec. 11.

1. In extradition proceedings for the offence of assault with intent to commit murder, the prosecution must prove such intent as well as the assault, and a committal for extradition is only authorized where the evidence, had the crime been committed in Canada, would have justified a "committal for trial" for the extradition crime charged and not merely for a less serious offence included therein.

DECIDED: June 12, 1902.

THE prisoner was in custody under a warrant issued by the Chief Justice under the Extradition Act, R.S.C. 1886, ch. 142, upon an information charging the prisoner with having on April 17th last, in the county of Aroostook, in the State of Maine, assaulted Frank W. Burns with intent then and there feloniously to kill and murder him. At the hearing before Mr. Justice Gregory evidence was given of the assault, and at its conclusion argument was considered upon the question whether the intent to murder was sufficiently made out.

Section 11 of the Extradition Act, Canada, provides as follows:—

11. If, in the case of a fugitive alleged to have been convicted of an extradition crime, such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, prove that he was so convicted,—and if, in the case of a fugitive accused of an extradition crime, such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, justify his committal for trial, if the crime had been committed in Canada, the judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison, there to remain until surrendered to the foreign

State, or discharged according to law; but otherwise the judge shall order him to be discharged.

Connell, K.C., for the prosecution.

Curry, K.C., and *Carvell*, for the prisoner.

FREDERICTON, N.B., June 12, 1902.

GREGORY, J.:—One of the crimes mentioned in the Extradition Treaty between Great Britain and the United States is “assaulting with intent to murder.” The right to have the prisoner extradited depends upon the establishment of the prisoner’s intent to murder. The words “feloniously to kill” in the information are surplusage. No matter how serious the assault may be, unless it is accompanied with the intent to murder, the accused is not liable to be extradited. By section 9 of the Extradition Act the judge or commissioner before whom the fugitive is brought is directed to hear the case in the same manner as nearly as may be as if the fugitive were brought before a justice of the peace charged with an indictable offence committed in Canada. By section 394 of the Criminal Code, after all the witnesses on the part of the prosecution and the accused have been heard, the justice of the peace is directed, if upon the whole of the evidence he is of opinion that no sufficient case is made out to put the accused upon trial, to discharge him, and by section 596, if he thinks that the evidence is sufficient to put the accused on his trial, he is to commit him for trial. Doubtless if the prisoner in this case was being examined before a justice of the peace on the offence laid against him, but committed in Canada, he would with propriety be committed for trial for some offence, but I do not think for the offence of assault with intent to murder, for the reason that I can see no evidence upon which any court or jury could hold that the assault was committed with intent to murder. [His Honour then referred to section 11 of the Extradition Act, and proceeded as follows]: Under this section before a judge would be warranted in committing a fugitive it would be necessary that such evidence should be produced as would according

to the law of Canada justify the committal of the accused for trial for an extradition crime. It was urged upon me by counsel for the prosecution that it was beyond my duty to consider the evidence of intention on the part of the accused; that I am not authorized to consider any matter of defence that the accused may set up, nor to enter into the question of intent. That, it was said, was a matter for the trial Court. I think it is properly contended that I am not to try the case or consider matters of defence, but if upon the evidence produced by the prosecution there is not sufficient evidence to establish an intention, such intention as is necessary to make an extradition crime, I am bound to discharge the prisoner.

Prisoner discharged.

Note: See note to *Re Watts*, ante, page 539.

[YORK COUNTY GENERAL SESSIONS, ONTARIO.]

BEFORE HIS HONOUR JOSEPH E. McDOUGALL, COUNTY JUDGE AND
CHAIRMAN OF SESSIONS.

THE KING v. KARN.

*Drugs for procuring miscarriage—Unlawful advertisement—Label with
caution against use—Interpretation—Cr. Code, sec. 79 (c).*

1. On a charge under Code sec. 179 (c) of advertising a medicine intended or represented as a means of causing miscarriage, and in support of which the printed advertisement alone is relied on, the words of the advertisement must be taken in their natural and primary sense, with the same strictness as in a case of criminal libel.
2. Without proof of the ingredients of a medicine advertised as a "female regulator," or other proof of the intent for which the medicine was sold, it should not be inferred from the fact that it was labelled with a printed "caution" against the use of the medicine during pregnancy, that it was intended or represented as a means of causing miscarriage.

DECIDED: December 9, 1901.

The prisoner, who was a manufacturer and dealer in a medicine advertised as a "Female Regulator," was indicted under sec. 179 (c) of the Code.

The indictment charged that the prisoner "did unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise and have for sale or disposal a certain medicine, drug or article, commonly known as 'Friar's French Female Regulator,' intended or represented as a means of preventing conception or causing of abortion or miscarriage, and did thereby then commit an indictable offence, contrary to the Crim. Code, sec. 179 (c)."

A box of the medicine was produced in the evidence. On the back of this box, in conspicuous lettering, was printed, "Caution—ladies are warned against using these tablets during pregnancy." Circulars were also produced explaining that its object was to promote a natural condition in the patient—it having the properties of an emmenagogue—which accompanied the remedy. No evidence was offered shewing the ingredients of the tablets, and the Crown simply pressed for a conviction for the offence of advertising.

Dewart, K.C., for Crown. The caution in reality counsels the employment of the medicine to avoid pregnancy.

DuVernet and S. W. Burns, for prisoner.

TORONTO, December 9, 1901.

MCDUGALL, Co.J., *held*, in accordance with the contention on behalf of the prisoner, that the words used must be taken in their natural and primary sense, and could not in this view be treated as coming within the contemplation of sec. 179 (c) of the Code. The case must be dealt with as though the allegation had been the subject of a criminal libel. The learned Judge directed the jury to return a verdict of not guilty, a case being reserved, if the Crown desired it, for the opinion of the Court of Appeal.

Verdict for defendant.

[COURT OF KING'S BENCH, QUEBEC.]
(CROWN SIDE).

DISTRICT OF MONTREAL.

BEFORE WURTELE, J.

THE KING v. LAURIN (No. 2).

Depositions before coroner—Irregular return of—Use of in cross-examination—Proof of signature—Depositions as evidence in case of death, illness, or absence—Certificate that depositions were read over—Cr. Code, secs. 568, 687.

1. Depositions signed by a witness at a coroner's inquest may be used on the cross-examination of that witness at the trial for the purpose of contradicting his testimony, or of testing his memory, although they were irregularly returned by the coroner to the Clerk of the Crown instead of to the magistrate. (Code, sec. 568.)
2. *Semble*, sec. 687 of the Criminal Code allowing the use of depositions as evidence in case of illness or absence of the witness applies as well to depositions taken at a coroner's inquest in the investigation of the charge against the accused as to depositions on a preliminary enquiry.

MONTREAL, March 17, 1902.

The prisoner was indicted and tried on the charge of having killed and murdered, on Sunday, the 26th day of January, 1902, in the City of Montreal, one of his father's stablemen, named George Wellington Smith.

While Amanda Johnson, the widow of the deceased, was under cross-examination, on the 17th day of March, 1902, a deposition, which she had given at the coroner's inquest, and which she had signed, was shewn to her by Mr. Macmaster, K.C., of counsel for the prisoner, for the purpose of establishing that she had made statements inconsistent with the testimony which she was then giving, and of contradicting her, and application was made that it should be read to the jury; but Mr. Cooke, K.C., one of the Crown prosecutors, raised the objection that it could be neither read to the jury nor used for the purpose of contradiction, because it had not been regularly produced, and was not legally before the Court. It was in the hands of the Clerk of the Crown, but he did not know how it had come into his possession.

WURTELE, J.:—The difficulty appears to have arisen from misapprehension on the part of the coroner. The law with respect to the procedure to be followed by coroners is imperfect and defective. I took an opportunity of suggesting to the law officers of the Federal Government that it was desirable that some provision should be made, such as exists in England, defining the course to be pursued by coroners in holding inquisitions. The appointment of coroners belongs, of course, to the Provincial Government, but there should be some enactment by Parliament to regulate their proceedings which appertain to procedure in criminal matters, and therefore come under its jurisdiction.

Article 568 of the Criminal Code provides that when a verdict has been rendered for murder or manslaughter, against any person, it is the coroner's duty to direct that he be taken before a magistrate, and to transmit to such magistrate the depositions which he has taken. He must transmit the depositions to the magistrate and not to the Clerk of the Crown. From the evidence which has been given, it appears that it has been the custom of the coroner to deposit at the end of each month with the Clerk of the Crown the records of all the inquests which he has taken during the month.

In order to make the depositions taken at a preliminary inquiry available in evidence, they must be taken in accordance with the provisions of the Criminal Code. One of the requirements is that the evidence be given in the presence of the accused, and that the latter has full opportunity to cross-examine; and then that the depositions be read over and signed in the presence of the accused. The same rule applies to depositions taken at a coroner's investigation.

In the present case there is no certificate that the deposition has been read over. It is consequently imperfect, but, notwithstanding this, it may be used, as it is signed by the witness, if it is admitted by her, or if it is proved that she did so, for the purpose of testing her memory or of contradicting her present testimony, but it cannot be used as evidence. In order to use it for testing the witness's memory, or for contradicting her present

testimony, it suffices that it be now produced and shewn to the witness, and it is not material that it should have been filed in the case and form part of the record. The coroner was bound in consequence of the verdict of murder rendered against the accused, to issue his warrant and have the accused arrested, and brought before a magistrate, and he was also bound to send the depositions to such magistrate. Then the magistrate would have to transmit them to the Clerk of the Crown with the depositions taken by himself as part of his record. I do not know whether they were sent by the coroner to the magistrate, and whether the latter sent them with the depositions taken by himself to the Clerk of the Crown, but I infer from the evidence that they were not. The depositions taken by the coroner and his inquest are now in the hands of the Clerk of the Crown but he does not know how he got them and whether they were transmitted to him by the coroner or by the magistrate or by counsel. He now produces them, and that is sufficient for the purpose for which the deposition in question is required. If a witness signs a document or deposition, it may be used to test his memory or to contradict him; but if a deposition taken at a preliminary inquiry has not been made according to the formalities of the law, although it may be used to test or to contradict, it cannot be used as evidence. Let the signature to the deposition be acknowledged by the witness or proved, and then the deposition may be used to contradict her present testimony, and it may be read to the jury with that end in view, and for that purpose.

Objection overruled.

J. P. Cooke, K.C., and E. Lafontaine, K.C., Crown prosecutors.

H. C. Saint Pierre, K.C., and D. Macmaster, K.C., for the prisoner.

Note: See the next case, *R. v. Laurin (No. 3)*, and note to same.

[COURT OF KING'S BENCH, QUEBEC.]
(CROWN SIDE).

DISTRICT OF MONTREAL.

BEFORE WURTELE, J.

THE KING v. EDOUARD C. LAURIN (No. 3).

Homicide—Trial—Deposition at coroner's inquest—Use of—Contradicting witness with his former deposition—Statement not purporting to be complete—Cr. Code, secs. 231, 687, 700.

1. The signed deposition of a witness at a coroner's inquest may be used on the cross-examination of the witness at the homicide trial for the purpose of contradicting the witness' testimony, although it is not certified to have been read over to the deponent and although it does not appear thereby that the deponent had no further testimony to add.
2. *Semble*, a deposition at a coroner's inquest is not admissible as evidence on the homicide trial on the deponent's death, illness or absence from Canada as a deposition on a preliminary enquiry would be, and sec. 687 of the Code does not apply to depositions taken before coroners.

DECIDED: March 17, 1902.

THE prisoner was on his trial for the murder of George Wellington Smith. The record of the coroner's inquisition, including the depositions taken, had not been regularly produced before the Court, and the coroner had been examined to prove the proceedings at the inquest. The documents composing the record of the inquisition having been proved by the coroner, it was then filed.

Macmaster, K.C., of counsel for the prisoner, moved that the deposition given at the inquest by Amanda Johnson, the widow of the man whom the prisoner was accused of having murdered, be read to the jury, with a view of contradicting the evidence which she had given at the trial, she being then under cross-examination.

Cooke, K.C., one of the Crown prosecutors, objected to its being read, on the grounds that the deposition did not shew that it had been read over to the witness and that it did not state that she had been asked whether it contained all that she had to say.

MONTREAL, March 17, 1902.

WURTELE, J.:—An application has been made to allow a deposition made by Mrs. Smith at the Coroner's inquest to be read to the jury. The deposition seems to have been regularly taken in the presence of the coroner, and to have been signed by him and by Mrs. Smith, and there is no evidence of any irregularity.

In the case of *R. v. Lalonde*, I refused to allow the depositions taken before the coroner to be read to the jury, because it was proved that the depositions were not a correct statement of what the witnesses had stated. In that case it was proved that the evidence was given verbally and that the coroner then made a concise statement of it, not in the language of the witnesses, but in his own words, and that this abridgement was then written down as their evidence. This was not in compliance with the law, which requires that the depositions should be taken down as they are given and should not be an abridgment drafted by the coroner of what he may have supposed the witnesses to have said. I refused, therefore, in *Lalonde's* case to allow the depositions, which I considered not to be a correct and true version of what the witnesses had said, to be read as contradictory evidence.

In the present case, however, the depositions seem to have been regularly taken down. The question is whether Mrs. Smith's deposition can be read or not. The weight of authority seems to be that a deposition taken before a coroner cannot be read as evidence to make the case of either party at a criminal trial; it has not the same quality as a deposition taken before a committing magistrate at a preliminary enquiry. In the event of the deponent's death, serious illness or absence from the country, a deposition at a preliminary enquiry may be read, when it is proved to have been regularly taken in the presence of the accused person and he has had full opportunity to cross-examine; it is then admissible and forms part of the evidence in the case. I am of opinion, however, that this rule does not apply to the

depositions taken before a coroner. The article of the Criminal Code which allows depositions in such cases to be read and put in evidence does not apply to depositions taken at a coroner's inquest. There is nothing in the law which authorizes such a use being made of a deposition taken at a coroner's inquest; but any written statement purporting to emanate or to have been signed by a witness may be shewn to him, and he may be cross-examined on it, in order to test his credibility or to contradict the evidence which he is then giving at the trial. When such a paper has been put in by the cross-examiner as evidence on his part for the purpose of contradiction, it may be read through to the jury and may be commented on. This very circumstance is mentioned in a small elementary work on procedure and evidence, which I now have under my hand, by Prentiss. Here is what he says: "It is questionable whether a deposition before a coroner is in any case receivable in evidence, except, however, for the purpose of contradicting a witness." The principle laid down there, that a deposition may be read for the purpose of contradicting a witness, is contained in our Criminal Code, which provides for the production of documents and papers for the purpose of testing a witness's veracity. Such documents and papers may, under the direction of the judge, be produced and be read to the jury for that purpose. In the present instance the deposition which it is proposed to put in and to have read is proved to have been signed by Mrs. Smith. I hold that this deposition cannot be put in to make evidence for the case of the Crown or for the defence; but that it may be put in and read for the purpose of contradicting, if possible, the present evidence of the witness.

Note: *Depositions taken at a coroner's inquest—Cr. Code sec. 687.*

Sec. 687 of the Criminal Code enables the giving in evidence, at the trial of an accused person upon indictment, of depositions theretofore taken *in the investigation of the charge against such person*, upon certain conditions appearing such as the decease, illness or absence from Canada of the former witness. It is, however, necessary in order to make sec. 687 applicable to the case that there should have been, at the time when the depositions were taken, a charge against the person whose trial subsequently ensues and in whose prosecution it is pro-

Note:—Continued.

posed to read the depositions. A coroner's inquest is primarily an inquiry upon the general question as to when, where, and by what means the deceased person came to his death, whether such death was due to violence for which some one is criminally responsible, and, if so, who the guilty party is. Unless a suspected person has been arrested and brought before a coroner's jury during their inquest it can hardly be said that the proceedings before the coroner constitute an investigation of a "charge" against any one in particular, and sec. 687 would not apply. The section specifically requires that the accused shall have been present when the depositions were taken, but presence at the inquest and taking part in the proceedings by examining witnesses can hardly be said to make the inquest a "charge" against such person if he is not then in custody by order of the coroner or other proper authority. Another requisite of sec. 687 as amended in 1900 is that the counsel or solicitor of the accused shall have had a full opportunity to cross-examine the witness whose deposition is in question, and it seems doubtful whether the section applies at all where the person, although accused and personally present, was not represented by counsel or solicitor. There seems to be no legal right to be so represented at a coroner's court. In an Ontario case it was held that a barrister cannot insist upon being present at a coroner's inquest, although retained to appear for the parties interested, and that he has no action against the coroner for excluding him from the room in which the inquest was held. *Agnew v. Stewart*, 21 U.C.Q.B. 396.

Where, however, it is clear that the proceedings before the coroner were an investigation of the charge against the person subsequently indicted, and he was present in person and represented by counsel or solicitor, who had a full opportunity of cross-examining the witness, it is submitted that the deposition is admissible in like manner to a deposition taken before a justice on a preliminary enquiry, and that sec. 687 of the Code would apply. The section is, in respect of depositions before coroners, restrictive of the former law under which the deposition was admitted, if the witness who had been examined before the coroner was (1) dead, (2) unable to travel, or (3) kept out of the way by the means and contrivance of the prisoner. *Lord Morley's case*, Kel. 55; *Thatcher's case*, Jones, 53; *Bromwich's case*, 1 Lev. 180; *Rex v. Stockley*, 1 East P.C. 310; 2 Phillips Evid, 8th ed., 75; 3 Russell on Crimes, 4th ed. 478; *R. v. Hamilton*, 16 U.C.C.P. 340.

APPENDIX.

CRIMINAL LAW AMENDMENTS, 1901 and 1902.

EXTRADITION CONVENTION BETWEEN GREAT BRIT- AIN AND THE UNITED STATES OF AMERICA.

IMPERIAL ORDER IN COUNCIL.

AT THE COURT OF ST. JAMES' THE 26TH DAY OF
JUNE, 1901.

Present:

THE KING'S MOST EXCELLENT MAJESTY.

Lord President.	Lord Steward.
Lord Privy Seal.	Lord Chamberlain.
Duke of Norfolk.	Lord Suffield.
Duke of Portland.	Mr. Ritchie.
Marquess of Dufferin and Ava.	

WHEREAS by the Extradition Acts, 1870 to 1895, it was amongst other things enacted that, where an arrangement has been made with any foreign State with respect to the surrender to such State of any fugitive criminals, His Majesty may, by Order in Council, direct that the said Acts shall apply in the case of such foreign state; and that his Majesty may, by the same or any subsequent Order, limit the operation of the Order, and restrict the same to fugitive criminals who are in or suspected of being in the part of His Majesty's dominions specified in the Order, and render the operation thereof subject to such conditions, exceptions, and qualifications as may be deemed expedient.

And whereas a convention was concluded on the thirteenth

day of December, one thousand nine hundred, between Her late Majesty Queen Victoria and the President of the United States of America, for the mutual extradition of fugitive criminals, which convention is in the terms following:—

Her Majesty the Queen of Great Britain and Ireland and the President of the United States, being desirous of enlarging the list of crimes on account of which extradition may be granted under the convention concluded between Her Britannic Majesty and the United States on the twelfth July, one thousand eight hundred and eighty-nine, with a view to the better administration of justice and the prevention of crime in their respective territories and jurisdictions, have resolved to conclude a supplementary convention for this purpose, and have appointed as their plenipotentiaries, to wit:—

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Excellency the Right Honourable Lord Pauncefote, Knight Grand Cross of the most Honourable Order of the Bath, Knight Grand Cross of the most Distinguished Order of St. Michael and St. George, and Her Majesty's Ambassador Extraordinary and Plenipotentiary to the United States; and

The President of the United States, the Honourable John Hay, Secretary of State of the United States;

Who, after having communicated to each other their respective full powers which were found to be in due and proper form, have agreed to and concluded the following articles:—

ARTICLE I.

The following crimes are added to the list of crimes numbered one to ten in the first article of the said convention of twelfth July, one thousand eight hundred and eighty-nine, on account of which extradition may be granted, that is to say:

11. Obtaining money, valuable securities, or other property by false pretenses.
12. Wilful and unlawful destruction or obstruction of railroads which endangers human life.
13. Procuring abortion.

ARTICLE II.

The present convention shall be considered as an integral part of the said extradition convention of twelfth July, one thousand eight hundred and eighty-nine, and the first article of the last-mentioned convention shall be read as if the list of crimes therein contained had originally comprised the additional crimes specified, and numbered eleven to thirteen in the first article of the present convention.

The present convention shall be ratified, and the ratifications shall be exchanged either at London or Washington as soon as possible.

It shall come into force ten days after its publication, in conformity with the laws of the high contracting parties, and it shall continue and terminate in the same manner as the said convention of twelfth July, one thousand eight hundred and eighty-nine.

In testimony whereof the respective plenipotentiaries have signed the present convention in duplicate, and have thereunto affixed their seals.

Done at Washington, this thirteenth day of December, one thousand nine hundred.

(L.S.) PAUNCEFOTE,

(L.S.) JOHN HAY.

And whereas the ratifications of the said convention were exchanged at Washington on the twenty-second day of April, one Privy Council, and in virtue of the authority committed to Him thousand nine hundred and one:

Now, therefore, His Majesty, by and with the advice of His by the said recited Acts, doth order, and it is hereby ordered, that from and after the thirteenth day of July, one thousand nine hundred and one, the said Acts shall apply in the case of the United States and of the said convention with the President of the United States of America.

Provided always, that the operation of the said Acts shall be and remain suspended within the Dominion of Canada so long as

an Act of Parliament of Canada passed in one thousand eight hundred and eighty-six, and entitled "An Act respecting the extradition of Fugitive Criminals," shall continue in force *there*, and no longer.

A. W. FITZROY,

Vide Canada Gazette, vol. xxxv., p. 407.

NOTE.—The following are the crimes made extraditable by the first article of the Convention of 12 July, 1889, between Great Britain and the United States of America, which the above Convention of 1901 enlarges:—

1. Manslaughter, when voluntary.
2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.
3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.
4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.
5. Perjury, or subornation of perjury.
6. Rape, abduction, child-stealing, kidnapping.
7. Burglary, house-breaking, or shop-breaking.
8. Piracy by the law of nations.
9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.
10. Crimes and offences against the laws of both countries for the suppression of slavery and slave-trading.

Participation in any of the crimes set forth in the Convention or in the tenth article of the Ashburton Treaty of 1842 is also extraditable, provided that such participation is punishable by the laws of both countries. (Convention of 1889, article 1.)

But extradition is not demandable if the alleged offence be of a "political character," or if the fugitive proves that his surrender is asked "with a view to try to punish him for an offence of a political character." (Convention of 1889, article 2.)

The Convention of 1889 (ratified March 11, 1890) was in itself supplemental only to the Ashburton Treaty of 1842 between Great Britain and the United States. Article 10 of that treaty is still in force, and is in the following terms:—

Article X. It is agreed that the United States and Her Britannic Majesty shall upon mutual requisitions by them, or their ministers.

officers or authorities, respectively made, deliver up to justice, all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found within the territories of the other;

Provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or the person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed;

And the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made upon oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive.

The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive.

REGULATIONS UNDER THE FRUIT MARKS ACT, 1901.

ORDER IN COUNCIL (CANADA).

By Order in Council of the 14th of September, 1901, under authority of the Act 1 Edward VII., chapter 27, intituled "An Act to provide for the Marking and Inspection of Packages containing Fruit for Sale," the following regulations were made, the same to come into force on the date of their publication in the *Canada Gazette*:—

REGULATIONS.

1. The Minister of Agriculture may make appointments of inspectors and other persons for the enforcement of the Act.

2. Any inspector charged with the enforcement of the Act may detain for the time necessary to complete his inspection any shipment of fruit, in respect of which he has reasonable grounds for believing that the marking of the package or the packing of the fruit constitutes a violation of the Act; such fruit shall at all times be at the risk and charges of the owner thereof; and

any inspector detaining fruit shall give the owner, where ascertained, notice that such fruit is being detained, in storage or otherwise, as the case may be.

3. The despatch of a prepaid telegram or letter to the packer whose name is marked on the package shall be considered due notice.

4. No person shall, for himself, or on behalf of any other person, pack any fruit for sale, contrary to the provisions of the Act.

5. Any inspector or other person who violates any of the regulations made under the authority of the Act shall for each offence, on summary conviction, be liable to a fine of not less than five dollars and not exceeding fifty dollars, together with the costs of prosecution.

Vide Canada Gazette, vol. xxxv., p. 499.

NOTE.—The criminal clauses of the Fruit Marks Act, 1901, are set forth in Vol. IV. of Can. Cr. Cases, at pages 602, 603.

REGULATIONS UNDER THE FISHERIES ACT (CANADA).

By Order in Council of the 12th of April, 1902, in virtue of the provisions of section 16 of chapter 95 of the Revised Statutes of Canada, the following regulation for the protection of fish against the use of dynamite, was made and established:—

1. It shall be unlawful for any person or persons to procure or have in possession on board of any boat or vessel or elsewhere within Canada, any dynamite or other explosive material with the intention of using or attempting to use or allowing or permitting the same to be used or attempted to be used for the purpose of catching or killing or attempting to catch or kill any kind of fish, shell-fish or marine animal.

2. It shall be unlawful for any person or persons to put or place or have upon or in any boat or vessel engaged or employed or intended to be engaged or employed in fishing, any dynamite or other explosive material.

3. In case any such dynamite or other explosive shall be found or proved to be, or to have been, in or upon any such boat or vessel, the master and the owner thereof shall each be liable for the penalty provided for breach of the last preceding regulation, as well as any other person or persons who may have put or placed such dynamite or other explosive upon or in the said boat or vessel, or had the same in possession therein.

Vide Canada Gazette, vol. xxxv., p. 2083.

CANADA EVIDENCE ACT.

An Act further to amend the Canada Evidence Act, 1893.

(Statutes of Canada, 2 Edw. VII., chapter 9.)

[Assented to 15th May, 1902.]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. *The Canada Evidence Act*, 1893, is amended by inserting, after section 6 thereof, the following section:—

“6A. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called upon either side without the leave of the court or judge or person presiding, such leave to be applied for before the examination of any of the experts who may be examined without such leave.”

REFORMATORY PRISONS.

An Act further to amend the provisions of Chapter 183 of the Revised Statutes with respect to the Halifax Industrial School and St. Patrick's Home at Halifax.

(Statutes of Canada, 2 Edw. VII., chapter 13.)

[Assented to 15th May, 1902.]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. Section 61 of the *Act respecting Public and Reformatory Prisons*, chapter 183 of the Revised Statutes, as that section is enacted by section 34 of chapter 37 of the statutes of 1890, is repealed and the following is substituted therefor:—

“61. Whenever any boy, who is a Protestant and a minor apparently under the age of eighteen years, is convicted in Nova Scotia of any offence, for which by law he is liable to imprisonment, the judge, stipendiary magistrate, justice or justices by whom he is so convicted may sentence such boy to be detained in the Halifax Industrial School for any term not exceeding five years and not less than one year.”

2. Section 62 of the said chapter 183, as that section is enacted by section 35 of the said chapter 37, is repealed.

3. Section 65 of the said chapter 183, as that section is enacted by section 36 of the said chapter 37, is repealed and the following is substituted therefor:—

“65. Whenever any boy, who is a Roman Catholic and apparently under the age of eighteen years is convicted in Nova Scotia of any offence for which by law he is liable to imprisonment, the judge, stipendiary magistrate, justice or justices by whom he is so convicted may sentence such boy to be detained in Saint Patrick's Home at Halifax for any term not exceeding five years and not less than one year.”

4. In its application to the Halifax Industrial School and Saint Patrick's Home at Halifax, section 956 of the Criminal

Code, 1892, shall be read and construed as if the word "eighteen" were substituted for the word "sixteen" in the third line thereof, and the word "one" were substituted for the word "two" in the thirteenth line thereof.

NOTE.—See also the Nova Scotia statute, 2 Edw. VII, c. 20, *infra* page 563, entitled "An Act respecting the maintenance and reform of juvenile offenders."

REMISSION OF PENALTIES.

An Act respecting the remission of Penalties.

(Statutes of Canada, 2 Edw. VII., chapter 26.)

[Assented to 15th May, 1902.]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

1. **Governor in Council May Remit Fines, etc.**—The Governor in Council may at any time remit, in whole or in part, any pecuniary penalty, fine or forfeiture imposed by any Act of the Parliament of Canada, whether such penalty, fine or forfeiture is payable to His Majesty or to some other person, or in part to His Majesty and in part to some other person, and whether it is recoverable on indictment, information or summary conviction, or by action or otherwise.

2. **As to Costs.**—Such remission may, in the discretion of the Governor in Council, be on terms as to the payment of costs or otherwise; provided that where proceedings have been instituted by private persons costs already incurred shall not be remitted.

3. **Retroaction in Certain Cases.**—The preceding sections of this Act shall also apply to any penalty, fine, or forfeiture heretofore incurred under the provisions of sections 298 to 305 of *The Railway Act*, and whether or not proceedings have heretofore been instituted or judgment obtained for the recovery thereof, but shall not otherwise be retroactive.

MERCHANDISE MARKS.

An Act to amend the Act respecting the Packing and Sale^{of} certain Staple Commodities.

(Statutes of Canada, 2 Edw. VII., chapter 32.)

[Assented to 15th May, 1902.]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—
as follows:—

1. Section 7 of chapter 26 of the statutes of 1901, intituled *An Act respecting the Packing and Sale of certain Staple Commodities*, is repealed, and the following is substituted there^{therefor}:—

“7. Upon, or attached to, every ball of binder twine offered for sale there shall be a stamp with the name of the manufacturer, importer or dealer, stating the number of feet of twine per pound in such ball.

“(2) Every manufacturer, importer or dealer who neglects to comply with the provisions of this section shall, on summary conviction, be liable to a penalty of not less than twenty-five cents per ball; and every manufacturer, importer or dealer of binder twine which is not of the proper length per pound which is stamped upon the ball, shall, upon summary conviction, be liable to a penalty of not less than one dollar and not more than twenty-five dollars per ball, and all such twine deficient in quantity shall be confiscated to the Crown: Provided that no deficiency in the number of feet contained in any ball shall be deemed a contravention of this section unless the deficiency exceeds five per cent. of the length stated upon the stamp.

“(3) Any proceedings under this section shall be taken within six months from the sale of any such ball.

“(4) The word ‘dealer’ whenever it occurs in this section shall be held to mean the dealer who is the direct purchaser from the manufacturer.”

2. Nothing in this Act contained shall be construed as affecting any dealer with respect to stocks of twine actually in his possession at the date of the passing of this Act.

NOTE.—The statute which the above Act amends is set forth in the Appendix to Vol. IV. of the Canadian Criminal Cases, at pages 597-602.

PROVINCE OF NOVA SCOTIA.

(Statutes of Nova Scotia, 2 Edw. VII., chapter 20.)

An Act respecting the "Maintenance and Reform of Juvenile Offenders."

[*Passed, March 27th, 1902.*]

Be it enacted by the Governor, Council, and Assembly, as follows:—

1. Whenever any judge or stipendiary magistrate of any city or incorporated town shall sentence to imprisonment any boy under the provisions of section 956 of the Criminal Code of Canada to either the Halifax Industrial School or St. Patrick's Home at Halifax, there shall be paid to the reformatory to which such boy is sentenced the sum of one hundred dollars per annum for the support of such boy. Sixty dollars of such amount shall be paid by the city, town, or municipality in which such boy has a settlement, and forty dollars shall be paid out of the provincial treasury of Nova Scotia. Such sum of sixty dollars shall constitute a charge upon the city, town or municipality in which such boy has a settlement, and shall be provided for out of the ordinary revenues of the city, town, or municipality.

2. Every judge or stipendiary magistrate of any city or incorporated town shall upon sentencing such boy to such reformatory give notice to the Provincial Secretary, and to the mayor or warden of the city, municipality or town in which such boy has a settlement.

3. If any boy sentenced as aforesaid by any judge or stipendiary magistrate of any city or incorporated town to either of said reformatories shall be found to be a transient without

having a settlement in any city, town or municipality in the province, the said sum of one hundred dollars for his maintenance shall be paid from the provincial Treasury.

4. The said reformatories are respectively authorized, subject to such regulations as are made in respect thereto, to receive and detain any boy so sentenced as aforesaid, and to collect and receive from the city, town or municipality and the government respectively the proportions of the allowance of one hundred dollars as provided by this Act.

5. Chapter 120 of the Revised Statutes, 1900, is repealed.

NOTE.—See also the Canada statute, 2 Edw. VII., chapter 13, *ante* page 560, amending the Dominion Reformatory Prisons Act.

PROVINCE OF QUEBEC.

(Quebec Statutes, 2 Edw. VII., chapter 19.)

An Act respecting the Judges of the Sessions of the Peace for the City of Montreal.

[Assented to 26th March, 1902.]

HIS Majesty, with the advice and consent of the Legislative Council and of the Legislative Assembly of Quebec, enacts as follows:—

1. Article 2489 of the Revised Statutes is amended by adding thereto the following clause:—

“The powers and jurisdiction conferred by law upon any recorder and recorder's court may, in the absence, on account of sickness or otherwise, of the recorders of the City of Montreal or of either of them, be exercised in the said city by any judge of the sessions of the peace for the said city.

2. This Act shall come into force on the day of its sanction.

PROVINCE OF ONTARIO.

(Statutes of Ontario, 1 Edw. VII., chapter 36.)

An Act to amend The Ontario Shops Regulation Act.

[Assented to 15th April, 1901.]

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Section 13 of *The Ontario Shops Regulation Act* is amended by adding thereto the following sub-sections:—

(3) The owner of every shop shall be held responsible for the providing of the sanitary conveniences provided under sub-section (2) of this section, and on failure or refusal to provide the same within two months after receiving written notice from the inspector, shall be liable on conviction to a fine of not more than \$500; or in default of payment of the same, shall be imprisoned for a period of not more than twelve months.

(4) Where grinding, polishing or buffing is carried on in any shop, the provisions of section 16 of *The Ontario Factories Act* shall apply to such shop.

2. Section 39 of *The Ontario Shops Regulation Act* is repealed and the following substituted therefor:—

39. No person shall require, permit or suffer any employee in any bake shop to work on Sunday, nor for more than twelve hours out of every twenty-four hours computed from the time when the employee commences to work, nor more than sixty hours in any one week, to be computed as commencing on Monday and ending on Saturday, both days inclusive, except by permission of the inspector given in writing to the employer; and a copy of such permission shall be posted in a conspicuous place in the bake shop.

BARBER SHOPS.

3. The said Act is further amended by adding thereto the following as sections 45 and 46:—

45. No employer shall require, permit or suffer any employee in any barber shop to work on Sunday, and no proprietor of any barber shop shall open his barber shop or permit the same to be opened to the public, or carry on any business or work therein at any time between the hours of 12 o'clock on Saturday night and 12 o'clock on Sunday night.

46. Any employer or any proprietor of any barber shop who violates the provisions of the preceding section shall on conviction thereof be liable to a penalty of not less than \$20 besides costs, and of not more than \$50 besides costs, and, in default of payment of the same, shall be imprisoned for a period of not less than thirty days and of not more than six months.

NOTE.—The Ontario Shops Regulation Act is chapter 257 of the Revised Statutes of Ontario 1897.

PROVINCE OF ONTARIO.

(Statutes of Ontario, 1 Edw. VII., chapter 13.)

An Act respecting Summary Convictions.

[Assented to 15th April, 1901.]

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. Sub-section 1 of section 2 of *The Ontario Summary Convictions Act*, being chapter 90 of the Revised Statutes of Ontario, is hereby amended by adding thereto the following: “and for greater certainty it is hereby declared that this sub-section is intended to include and to make applicable to any such conviction or order and to any warrant for enforcing the same the provisions of the said statutes of Canada relating to the matters and things which are dealt with or included in sections 889 to 896, both inclusive, of *The Criminal Code*, 1892.

Nothing herein contained shall be deemed to imply that the said provisions are not now included in the said sub-section of

section 2 and section 8 respectively, or to limit the application of the said sub-section and section.

NOTE.—The sub-section referred to assimilates the procedure before justices of the peace in matters of summary conviction under provincial law to that under Dominion law.

Sections 889, 890 and 896 of the Criminal Code validate certain irregular convictions. Section 891 deals with the protection of the justice against action on a conviction being quashed. Sections 892 and 893 with the conditions upon which a motion to quash will be heard. Section 894 relates to proclamations, orders in council, etc., by the Federal Government and declares that they shall be judicially noticed without proof of publication in the Canada Gazette. Section 895 dispenses with the necessity of a writ of *procedendo* after the affirmance of a conviction brought up on a motion to quash.

2. Section 8 of the said Act is amended by inserting in the eighth line thereof after the word “thereof” the words “including the practice and procedure as to the statement of a case for the opinion of the Court.”

NOTE.—Sec. 8 above referred to assimilates the practice and proceedings on appeals from justices of the General Sessions of the Peace in matters under Ontario provincial law to the practice and proceedings on appeals from justices under Dominion statutes, *i.e.*, Code secs. 879 *et seq.* This amendment makes it clear that the practice on appeals by “stated case” (see Code sec. 900), is also included.

3. The Supreme Court of Judicature for Ontario may prescribe by rules of court that no motion to quash any conviction, order or other proceeding had or made under the authority of a statute of the Legislature of Ontario or other statute or law in force in the Province of Ontario and relating to matters within the legislative authority of the Legislature, and brought before the High Court of Justice for Ontario by *certiorari* shall be entertained unless the defendant is shewn to have entered into a recognizance with one or more sufficient sureties before a justice or justices of the county or place within which such conviction or order has been made, or before a judge or other officer, as may be prescribed by such rule of court, or to have made a deposit to be prescribed in like manner, with a condition to prosecute such writ of *certiorari* at his own costs and charges, with effect with-

out any wilful or affected delay, and, if ordered so to do, to pay to the person in whose favour the conviction order or other proceeding is affirmed his full costs and charges, to be taxed according to the course of the court where such conviction order or proceeding is affirmed.

NOTE.—Compare with Code section 892.

4. Until any such rule shall be passed under the preceding section, the rule passed by the High Court of Justice for Ontario on the 17th day of November, 1886, shall be applicable to all motions to quash any conviction order or proceeding in the preceding section mentioned.

NOTE.—The following is the text of the rule referred to in the above section 4:—

HIGH COURT OF JUSTICE.

WEDNESDAY, the 17th day of November, 1886.

Present:

THE HONOURABLE ADAM WILSON, P.H.C.J.

“ J. A. BOYD, Chancellor.

“ M. C. CAMERON, C.J.C.P.D.

“ J. D. ARMOUR, J.

“ T. FERGUSON, J.

“ J. E. ROSE, J.

WHEREAS, by the Act passed in the 49th year of Her Majesty's reign, chaptered 49, and intituled “An Act to make further provision respecting summary proceedings before justices and other magistrates”, it is enacted as follows:—

SEC. 8.—The second section of the Imperial Act, passed in the fifth year of the reign of His Majesty King George II., and chaptered nineteen, shall no longer apply to any conviction, order, or other proceeding by or before a Justice of the Peace in Canada, but the sixth section of this Act shall be substituted therefor, and the like proceedings may be had for enforcing the condition of a recognizance taken under this Act, as might be had for enforcing the condition of a recognizance taken under the said Imperial Act.”

It is therefore ordered, under the authority of the said section, and in pursuance of the terms of the sixth section of the said Act, that no motion shall be entertained by this Court, or by any division of the same, or by any judge of a division sitting for the Court, or in Chambers, to quash a conviction, order, or other proceeding which has been made by or before a justice of the peace [as defined by the said Act] and brought before the Court by *certiorari*, unless the defendant is shewn to have entered into a

recognizance with one or more sufficient sureties in the sum of \$100 before a justice or justices of the county, or place, within which such conviction or order has been made, or before a judge of the County Court of the said county, or before a judge of the Superior Court, and which recognizance with an affidavit of the due execution thereof, shall be filed with the Registrar of the Court in which such motion is made or is pending, or unless the defendant is shewn to have made a deposit of the like sum of \$100 with the Registrar of the Court in which such motion is made, with or upon the condition that he will prosecute such *certiorari* at his own costs and charges and without any wilful or affected delay, and that he will pay the person in whose favour the conviction, order, or other proceeding is affirmed, his full costs and charges to be taxed according to the course of the Court in case such conviction, order, or proceeding is affirmed.

5. The Act of Parliament of the United Kingdom passed in the fifth year of the reign of His Majesty King George the Second and chaptered nineteen, in so far as it is in force in this Province by virtue of any statute of this Province, is hereby repealed.

NOTE.—Sec. 893 of the Criminal Code, which is made applicable by section 1 of this Act, declares that sec. 2 of 5 Geo. II., c. 19, shall no longer apply to any conviction order or other proceeding by or before a justice in Canada.

PROVINCE OF ONTARIO.

(Statutes of Ontario, 2 Edw. VII., chapter 12.)

An Act to amend the Statute Law.

13. *The Act respecting Police Magistrates* is amended by inserting therein as section 3a thereof the following:—

3a The Lieutenant-Governor in Council may appoint a second police magistrate for any city containing not less than 200,000 inhabitants at a salary to be named in the order making the appointment, or by a subsequent order, and the salary so named shall be paid by the city quarterly to such police magistrate and shall not exceed the sum of \$1,500.

14. Section 7 of *The Ontario Summary Convictions Act* is amended by adding the following sub-section thereto:—

(2) No such conviction or order as aforesaid shall be removed into the High Court of Justice by writ of *certiorari* except upon the ground that an appeal to the Court of General Sessions of the Peace as herein provided would not afford an adequate remedy.

NOTE.—Section 7, to which the above sub-section is added, is as follows:—

7. Any party who considers himself aggrieved by a conviction or order made by a justice of the peace, or by a police or stipendiary magistrate, under the authority of any statute in force in Ontario, and relating to matters within the legislative authority of the Legislature of Ontario, may, unless it is otherwise provided by the particular Act under which the conviction or order is made, appeal therefrom to the General Sessions of the Peace.

15. All the provisions of The Criminal Code, 1892, with respect to amendment of convictions or orders either on appeal or when removed by *certiorari*, and, subject to section 12 of *The Ontario Summary Convictions Act*, of any other Act of the Parliament of Canada authorizing the amendment of a conviction or order shall apply to convictions or orders made under the authority of any statute of this Province or under any by-law passed by virtue of such authority.

NOTE.—See Code sections 883 and 889.

PROVINCE OF ONTARIO.

(R.S.O., vol. 3, chapter 324, in force from 2nd June, 1902.)

CERTIORARI.

37. And for the better preventing vexatious delays and expense, occasioned by the suing forth orders of *certiorari* for the removal of convictions, judgments, orders, and other proceedings, before justices of the peace, no order of *certiorari* shall be granted, issued forth, or allowed, to remove any conviction, judgment, order, or other proceedings, had or made by or before any justice of the peace of any county, or the general or quarter sessions thereof, unless such *certiorari* be moved, or applied for,

within six calendar months next after such conviction, judgment, order, or other proceedings, shall be so had or made, and unless it be duly proved upon oath, that the said party suing forth the same hath given six days' notice thereof in writing to the justice or justices, or to two of them (if so many there be), by and before whom such conviction, judgment, order, or other proceeding, shall be so had or made, to the end that such justice or justices, or the parties therein concerned, may shew cause, if he or they shall so think fit, against the issuing or granting such *certiorari*.
13 Geo. 2, c. 18, s. 5.

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Abortion.

Drugs for procuring miscarriage—Unlawful advertisement—Label with caution against use.

On a charge under Code sec. 179 (c) of advertising a medicine intended or represented as a means of causing miscarriage, and in support of which the printed advertisement alone is relied on, the words of the advertisement must be taken in their natural and primary sense, with the same strictness as in a case of criminal libel. Without proof of the ingredients of a medicine advertised as a "female regulator," or other proof of the intent for which the medicine was sold, it should not be inferred from the fact that it was labelled with a printed "caution" against the use of the medicine during pregnancy, that it was intended or represented as a means of causing miscarriage. THE KING v. KARN, (Ont.) 543

Adjournment.

Summary proceedings—Adjournment of hearing.

On the return of a summons in a summary proceeding before justices of the peace, the person summoned must wait a reasonable time after the hour named in the summons, when the justices are at that hour engaged in other official business.

THE KING v. WIPPER, (N.S.) 17

Adjudication.

See CONVICTION.

Admissibility.

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Agent.

Agency—Illegal sale of liquor—Sale by "clerk, servant or agent"—Ejusdem generis.

An illegal sale of liquor to an Indian by a hotel cook or other employee unauthorized by the proprietor to sell liquors is not, in the absence of any knowledge or connivance on the part of the proprietor, a sale "by his clerk, servant, or agent" so as to render the proprietor liable to the penalty imposed by the Indian Act, R.S.C. 1886, ch. 43, sec. 94, as amended by 51 Vict., ch. 22, sec. 4.

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Amendment

Of conviction on certiorari.

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Of convictions under Ontario Summary Convictions Act.

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Appeal

Notice of appeal—Service on magistrate.

A notice of appeal from a summary conviction neither addressed to nor served upon the prosecutor, but addressed to and served upon one only of two convicting justices of the peace, is insufficient, though it appears that when the notice was so served the justice upon whom it was served was verbally informed that it was for the prosecutor.

HOSTETTER v. THOMAS, (N.W.T.)

10

Security—Money deposit in lieu of recognizance.

On an appeal from a summary conviction the appellant making a money deposit in lieu of recognizance must see to it that such deposit is returned by the justice into the Court to which the appeal is taken, and in default the appeal cannot be heard. The fact that the appellant had made such a deposit is a matter of record and is not properly provable by affidavit.

THE QUEEN v. GRAY, (Ont.)

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Stated case dismissed for non-compliance with statutory conditions—Subsequent appeal—Waiver.

A person "appeals" when he formally gives notice to the opposite party of his intention to appeal, although he does not in fact comply with the conditions precedent required to bring the appeal on for hearing. (Code sec. 900.) Under a provincial enactment, similar to sub-sec. 15 of Code sec. 900, providing that a person appealing by way of stated case to a superior Court shall be taken to have abandoned his right of appeal to a County Court, the appellant by obtaining a case to be stated elects the mode of appeal and cannot revert to an appeal to the County Court on the stated case being dismissed for non-compliance with statutory conditions.

COOKSLEY v. TOOMATEN OOTA, (B.C.)

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Summary trial—Jurisdiction of magistrate without consent of accused.

There is no right of appeal from a conviction by a police magistrate under the summary trials procedure (part LV.), although the offence is one which the magistrate may try thereunder without the consent of the accused.

THE QUEEN v. NIXON, (Ont.)

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Appeal from summary conviction—Time for recognizance or deposit.

Appeal—Cont.

Where on an appeal from a summary conviction the appellant does not make the deposit in lieu of recognizance until after the sittings of the Appellate Court at which he should have brought the appeal on for hearing, and for which notice was given, the appeal cannot be heard. There is no jurisdiction to award costs against the appellant in respect of the proceedings in appeal at any other sittings than the one for which notice was given (Code sec. 884.)

MC SHADDEN v. LACHANCE, (B.C.) 43

Summary trial by Recorder's Court, Montreal—No right of appeal.

No appeal lies from the decision of the Recorder's Court of Montreal holding a "summary trial" under Cr. Code, sec. 783.

THE KING v. PORTUGAIS, (Que.) 100

Case stated—Transmitting case to district registry.

The provision in sec. 87 of the B.C. Summary Convictions Act, that the appellant shall, within three days after receiving the case stated, transmit it to the District Registry, is a condition precedent to the jurisdiction of the Court to hear the appeal.

COOKSLEY v. NAKASHIRA, (B.C.) 111

Fisheries Act, R.S.C. 1886, ch. 95—Code sec. 879.

An appeal lies under Code sec. 879 from a conviction made under the Fisheries Act, R.S.C., ch. 95, sec. 18, notwithstanding the special appeal provided by that Act. The special appeal, which under the Fisheries Act may be made to the Minister of Marine and Fisheries, may be taken after the disposal of an appeal to a County Court. THE KING v. TOWNSEND; THE KING v. MURTAGH, (N.S.) 143

Notice of appeal—Address—Service on convicting justice.

A notice of appeal from a summary conviction served upon the convicting justices is not invalid because it is not addressed to them by name. Cragg v. Lamarsh (1898), 4 Can. Cr. Cas. 246, not followed.

THE KING v. JACK, (B.C.) 160

To Supreme Court of Canada—Court of Appeal unanimously affirming conviction on one ground—Dissent on another ground.

Where the Court of Appeal is unanimous in affirming the conviction as to one of the grounds of appeal, but there is a dissent as to another ground, a further appeal to the Supreme Court of Canada under Code sec. 742 can be based on the latter only, and the appeal cannot be dealt with in respect to the ground on which the Court of Appeal was unanimous.

MCINTOSH v. THE QUEEN, (Can.) 254

Summary conviction—Appeal—Subsequent habeas corpus proceedings.

Appeal—Cont.

The decision of the Court of General Sessions or County Court in appeal from a summary conviction is final and conclusive, and a superior court has no jurisdiction to interfere by habeas corpus.

THE KING v. BEAMISH, (B.C.) 388

Summary conviction—Notice of appeal—Form and service of.

A notice of appeal under the British Columbia Summary Convictions Act is sufficient if addressed to the convicting magistrate only and served on him only. The recognizance or deposit required to be given or made on appealing from a summary conviction under that statute (similar to Cr. Code sec. 880 (c) is not invalid because the appellant was not first taken into custody. The notice of appeal need not recite that the appellant is a "person aggrieved" by the decision appealed from (see Code sec. 879).

THE KING v. JORDAN, (B.C.) 438

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An appeal to the Supreme Court of Canada from the decision of a Court of Appeal on a case reserved at the trial is governed by sec. 750 of the Criminal Code without regard to the Statute of 1897, 60-61 Vict. (Can.), ch. 34, respecting leave to appeal from the Ontario Court of Appeal, and the latter statute does not apply to criminal appeals.

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Arrest without warrant—Entry in police charge book—Want of sworn information.

Where the accused found committing a criminal offence is arrested without warrant by a peace officer, and on being brought before

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a police magistrate a written charge not under oath is read over to him, and he thereupon consents to be tried summarily, the police magistrate has jurisdiction to try the case, although no information has been laid under oath. **THE KING v. McLEAN, (N.S.) 67**

Arrest and search—Reasonable and probable cause.

Where a police officer, acting under the instructions of the post office department in investigating the alleged theft of letters by letter carriers, believed that the carrier had stolen the letter and detained and searched him, an action for false arrest will not lie in the absence of malice. **MAYER v. VAUGHAN, (Que.) 392**

Under warrant of commitment—Temporary release of prisoner—Promise of prisoner to surrender himself—Re-arrest.

Where the officer executing a warrant of commitment releases the prisoner, at his request, for a temporary period, on his promise to surrender himself, such does not constitute a voluntary abandonment of the arrest, and a re-arrest is justified upon the same warrant. **THE KING v. O'HEARON (No. 2), (N.S.) 531**

Under warrant of commitment; deposit of money with constable; delay at defendant's request. 94

Assault.

Aggravated assault—Summary trial—Civil action not barred.

Where a magistrate invested with the powers of two justices tries a case of aggravated assault under the summary trials procedure with the consent of the accused (Code sec. 786), the conviction is a bar to further criminal proceedings for the same cause (Code sec. 799) but not to a civil action for damages. The provisions of Code sec. 866 do not apply to such a case.

CLARKE v. RUTHERFORD, (Ont.) 13

Assault with intent to commit murder—Proof of intent—Extradition Act, R.S.C. 1886, ch. 142, sec. 11.

In extradition proceedings for the offence of assault with intent to commit murder, the prosecution must prove such intent as well as the assault, and a committal for extradition is only authorized where the evidence, had the crime been committed in Canada, would have justified a "committal for trial" for the extradition crime charged and not merely for a less serious offence included therein.

RE KELLY, (N.B.) 541

Appeal from summary conviction; time for recognizance. See APPEAL. McSHADDEN v. LACHANCE. 48

Attempt.

Consent to summary trial—Conviction for attempt only—Describing the offence.

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The provision of sec. 711 of the Code that when the complete commission of the offence charged is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt applies to summary trials before city and town police magistrates under sec. 785 of the Code, as well as to trials upon indictment. On a summary trial before the police magistrate of a city or town under sec. 785 of the Code, the consent of the accused to be tried summarily is to be taken as a consent to a summary trial for whatever offence he might be found guilty of at a Court of General Sessions, were he being there tried on a like charge. Per Armour, C.J.O.:—An indictment for an attempt to commit theft from the person would be sufficient if it charged that at a specified time and place the accused did attempt to "pick the pocket" of a person named (Sec. 611). Quære, whether a magistrate trying a case summarily under sec. 783 and not under sec. 785, on a charge of theft where the value is under \$10 could convict for an attempt.

THE KING v. MORGAN (No. 2), (Ont.) 272

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The dismissal of a prior charge under the Canada Temperance Act in which the offence was laid as between certain dates is not necessarily a bar to a subsequent prosecution for an offence committed within the same period of time, but the question of identity of offence is for the magistrate. Upon a defence that the accused has been formerly acquitted in a summary proceedings before magistrates for the same alleged offence, the onus of proving the identity of the charge is upon the defendant.

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Bail.

Homicide—Self-defence—Charge of Manslaughter.

Where a prisoner committed for trial on a charge of manslaughter would ordinarily be admitted to bail, bail will not be refused because the Crown prosecutor swears to a belief that he can prove the offence to have been murder.

THE KING v. SPICER, (N.S.)

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Counselling or procuring perjury—Common law offences not provided for in the Criminal Code—When one justice may admit to bail.

It is an offence at common law to offer money to a witness to testify regardless of its truth or falsehood, to certain allegations

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which are false, although not shewn to be false to the knowledge of the accused, and although the proposed testimony was not in fact given. The common law jurisdiction as to crime is still operative notwithstanding the Criminal Code, but subject to the latter prevailing where there is a repugnancy between the common law and the Code. Where the charge in respect of which the accused person has been committed for trial is an offence at common law not provided for by the Code and formerly a misdemeanor, one justice of the peace may commit for trial and admit to bail as at common law.

THE KING v. COLE, (Ont.) 330

Extradition—Bail pending habeas corpus—Propriety of bail in extradition.

Under ordinary circumstances bail should not be granted to a person committed for extradition. Where bail was granted to the accused in extradition proceedings pending a habeas corpus application on his behalf, and afterwards the application for his discharge under habeas corpus was refused, the accused must surrender himself into close custody before a fresh application will be entertained to bail him pending an appeal from the order refusing his discharge.

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By-law.

Municipal by-law against Sunday trading—Carrying on retail business—Trifling sale—Unreasonably large fine imposed.

Where an unreasonably large fine has been imposed by a magistrate under a municipal by-law for a trifling offence thereunder, the Court having jurisdiction to re-try the case on appeal may set aside the conviction and re-convict with a lesser penalty.

SING KEE v. JOHNSTON, (B.C.) 454

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Canada Temperance Act.

Constitutional law—Power to confer summary jurisdiction.

Sec. 103 of the Canada Temperance Act, R.S.C. (1886), ch. 106, as amended by 51 Vict., ch. 34, sec. 6, enabling any two justices of the peace to adjudicate upon prosecutions under that Act. is *intra vires* of the Parliament of Canada.

THE KING v. WIPPER, (N.S.) 17

Parish Court Commissioners in New Brunswick—Autrefois acquit—Identity of charge—Onus.

The dismissal of a prior charge under the Canada Temperance Act in which the offence was laid as between certain dates is not necessarily a bar to a subsequent prosecution for an offence committed within the same period of time, but the question of identity of offence is for the magistrate. Upon a defence that the accused had been formerly acquitted in summary proceedings before magistrates for the same alleged offence, the onus of proving the identity of the charge is upon the defendant. The Parliament of Canada has not the power to give a Provincial Court a jurisdiction which is not within the scope of such Court's powers as established by the Provincial Legislature. Sec. 103 of the Canada Temperance Act, R.S.C. 1886, ch. 106 (amended by 51 Vict., ch. 34, sec. 6) is *ultra vires* of the Dominion Parliament in so far as it purports to confer jurisdiction upon Parish Court Commissioners in New Brunswick to entertain prosecutions thereunder. A summary conviction for a third offence under the Canada Temperance Act was quashed on the ground that one of the prior convictions relied upon was made by a Parish Court Commissioner, the jurisdiction of which Court under provincial law did not extend to such prosecutions.

EX PARTE FLANAGAN, (N.B.) 82

Information before one magistrate and trial before another—Invalidity—Third offence—Proving previous conviction.

Sec. 104 of the Canada Temperance Act, as amended 1888, ch. 34, has the effect of giving to a police or stipendiary magistrate before whom an information was laid the exclusive jurisdiction to try the case, and a conviction made by another stipendiary magistrate on the same information is void. Where such an information and conviction thereon are produced in a subsequent prosecution as

Canada Temperance Act—Cont.

proof of a previous conviction (C.T. Act, sec. 115 (b)), the record of conviction is of no more force than if signed by one who had ceased to be a magistrate before the date thereof, and is not evidence. A defendant imprisoned on a conviction for a third offence under the Canada Temperance Act is entitled to be discharged on habeas corpus if the conviction relied upon as proving a previous conviction for a second offence was made by a police or stipendiary magistrate irregularly proceeding under and by virtue of an information in respect of second offence laid before another police or stipendiary magistrate or magistrate vested with the authority of two justices.

THE KING v. MACDONALD, (N.S.) 97

Keeping liquor for sale—Search warrant—Order for the destruction of the liquor—Disqualification of prosecutor.

The prosecutor of a charge of keeping liquor for sale contrary to the Canada Temperance Act, being personally liable for costs in the event of the prosecution failing, is, though a peace officer, disqualified from executing a search warrant or order for the destruction of the liquor in respect of which the information was laid.

EX PARTE MCCLEAVE, (N.B.) 115

Proof of previous conviction—Statutory interrogation of accused after conviction—Defendant absent but represented by solicitor—Interrogation of solicitor.

A solicitor appearing for the accused at the trial before a magistrate of a charge of a second or subsequent offence against the Canada Temperance Act represents his client for the purpose of being interrogated as to the previous conviction although the client is not then present; and the magistrate, on his failure to answer, is justified in receiving evidence of the previous conviction.

THE KING v. O'HEARON, (N.S.) 187

Sale of intoxicating liquors—Judicial sale by sheriff.

The Canada Temperance Act does not prohibit judicial sales of intoxicating liquors. Under a warrant of distress upon a conviction for an offence against the second part of the Canada Temperance Act, the defendant's property must be levied on, though it consists of intoxicating liquors only, and is in a place where the second part of the Act is in force. On a habeas corpus application under Consol. Stat., N.B., ch. 41, sec. 4, it may be shewn that the constable's return to the warrant of distress, that there was not sufficient property to satisfy it, is false, and that therefore the commitment based thereon, under which the party is imprisoned, was improperly issued.

EX PARTE FITZPATRICK, (N.B.) 191

Justices of the peace—Disqualification—Membership in temperance alliance.

Canada Temperance Act—Cont.

Justices of the peace, who belong to an association (a temperance alliance) of which the president is the party prosecuting, and to which association any fine to be imposed upon the accused for the offence against the liquor law with which he is charged would be paid under resolution of the municipal council, are disqualified from trying the charge, and will be prevented by a writ of prohibition from so doing. The fact that between the time when the information was received by such justices and the hearing of the charge, the justices had withdrawn from the association, does not validate the proceedings.

DAIGNEAULT v. EMERSON, (Que.) 534

Case reserved.

See RESERVED CASE.

Cattle stealing.

Right to trial by jury—N.W.T. Act, sec. 66.

The indictable offence of "stealing cattle" (Code sec. 331) is theft within the provisions of the North-West Territories Act respecting summary trials without a jury. Although the punishment which may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, a person charged with having stolen cattle the value of which does not, in the opinion of the trial judge, exceed \$200, has not the right in the N.W. Territories to be tried by jury.

THE QUEEN v. PACHAL, (N.W.T.) 34

Evidence of ownership—Brand—Earmark.

The production of a steer's hide with the prosecutor's brand and earmarks only upon it, and the evidence of the prosecutor that he had owned and had never parted with the steer from which the hide had come, is sufficient proof of identity of the steer as the property of the prosecutor. (See now Cr. Code sec. 707a.)

THE QUEEN v. FORSYTHE, (N.W.T.) 475

Certiorari.

Certiorari taken away by statute—Defect in procedure depriving accused of fair trial.

A statute which declares that convictions thereunder shall not be removed by certiorari into any superior court is not a bar to the issue of a certiorari upon the ground of improper conduct of the magistrate, by which the accused was deprived of a fair trial. The powers of amendment conferred by Code sec. 889 in respect of convictions removed by certiorari do not apply where there is an inherent defect in the procedure which has deprived the accused of a fair trial, ex. gr., a view of the locus in quo taken by the magistrate in the absence of the parties.

trate in the absence of the parties.

RE SING KEE, (B.C.) 86

Certiorari—Cont.

When the appropriate remedy—Effect of statute taking away right of certiorari—Double remedy of certiorari and appeal.

Certiorari and not appeal is the appropriate remedy to raise the question of want of jurisdiction, *ex. gr.*, whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest. A statutory provision taking away the right to a certiorari does not deprive the superior court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction. Where there is a defect in the jurisdiction of justices of inferior courts, the common law right of certiorari should not be refused merely because a new trial might be had by means of an appeal. Even where an appeal is pending, a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal. A writ of certiorari may be claimed by the Crown as a matter of right on application of the Attorney-General without the production of any affidavit. Except where applied for on behalf of the Crown, a certiorari is not a writ "of course," and the Court must be satisfied that there is sufficient ground for issuing it. No more latitude is given the court for the exercise of its discretion in granting or refusing a certiorari than in respect of other applications which are in the discretion of the court.

RE RUGGLES, (N.S.) 163

Discharge on habeas corpus—Subsequent motion to quash conviction.

A motion to quash a summary conviction cannot be entertained by Superior Court without a writ of certiorari for that purpose and a return to such writ. Where on a habeas corpus application the magistrate is directed by an order to return the proceedings relating to the imprisonment and thereupon returns under such order the information, depositions and conviction, such conviction is not by reason thereof brought under the jurisdiction of the Superior Court for the purpose of a motion to quash the same. The mere fact of judicial proceedings before inferior tribunals being on the files of a Superior Court certified or verified for use as evidence by the same officer who would make the return to a writ of certiorari to bring them up, does not bring the matter or cause into the Superior Court.

THE KING v. MACDONALD (No. 2). (N.S.) 279

Statutory restriction of certiorari—2 Edw. VII. (Ont.), ch. 12, sec. 14—Application of.

The Ontario statute 2 Edw. VII. (1902), ch. 12, sec. 14, which declares that no conviction under the Ontario Summary Convictions Act shall be removed by certiorari except upon the ground that an appeal would not afford an adequate remedy does not pre-

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vent the granting of the writ where the magistrate has no jurisdiction over the matter adjudicated.

THE KING v. ST. PIERRE, (Ont.) 366

No return of information to justice after conviction quashed.

Where a summary conviction has been removed by certiorari, together with the information and proceedings thereon, and the conviction is thereupon quashed, the information becomes part of the record in the Court above and cannot be returned to the magistrate for the purpose of a second summons thereon, although the ground for quashing the conviction was that the defendant had not been served, and had not authorized an appearance for her. An order for the return of any of the proceedings to the convicting justice is only authorized under Cr. Code sec. 895 in cases where formerly a procedendo would have issued upon the conviction being affirmed, and not where the conviction is quashed. Prohibition will be granted against a justice to prevent his proceeding under a second summons after the quashing of a conviction for want of service of the first summons or of appearance thereunder. *Semble*, per Killam, J., the justices in proceeding with the second summons were guilty of contempt of Court, notwithstanding that the information had been returned to them under a judge's order.

THE QUEEN v. ZICKBICK, (Man.) 390

Costs against prosecutor and magistrate on quashing conviction—Jurisdiction—Distinction between offences under Dominion and provincial laws.

The High Court of Justice in Ontario has no jurisdiction in certiorari proceedings respecting a criminal charge under Dominion laws, to award costs against the prosecutor or the magistrate on quashing the conviction. There is no jurisdiction to award costs against an unsuccessful applicant in certiorari proceedings respecting a purely criminal charge either because of the recognizance or of an inherent power of the Court. *Semble*, in certiorari proceedings in respect of quasi-criminal prosecutions under Ontario statutes the provisions of the Ontario Judicature Act as to costs are applicable since the passing of the Law Courts Act (Ont.) 1896.

THE KING v. BENNETT, (Ont.) 456

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Character.

Cross-examination of prisoner as to previous convictions for indictable offences—Relevancy—Credibility of witness—Character evidence.

An accused person examined as a witness on his own behalf, may be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character had been adduced for the defence. The question is relevant to the issue as affecting the credibility of the accused as a witness. **THE KING v. D'Aoust, (Ont.)** 407

Character evidence—When evidence of prisoner's bad character admissible.

The prosecution is not entitled to give evidence of the prisoner's bad character, unless or until the prisoner adduces evidence to prove his good character, either by examining his own witnesses on that point or by questioning the Crown witnesses thereon as a part of their cross-examination. A new trial will be ordered where such evidence is wrongly admitted against the prisoner, although no objection was raised to it by the prisoner's counsel.

THE KING v. WILLIAM LONG, (Que.) 493

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Coal oil.

By-law regulating storage of.

Coal oil, crude oil and naphtha are "combustible or dangerous materials" within the meaning of the Ontario Municipal Act, sec. 542, which authorizes the passing of by-laws for fire prevention regulating the keeping and storing of "gunpowder and other combustible or dangerous materials." Municipal regulations of a merely local

Coal oil—Cont.

character, made in exercise of police powers for the prevention of fires and authorized by provincial legislation, are not invalid as to the storage of petroleum and its products because of Dominion revenue laws dealing with such storage, nor are they an interference with "trade and commerce" within the meaning of the British North America Act.

THE KING v. MCGREGOR, (Ont.) 485

Commission.

Commission to take evidence—Time of application for.

A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record. An order for a commission to take such evidence should not be made before plea.

THE QUEEN v. NICHOL, (B.C.) 31

Commitment.

Delay of execution at defendant's request—Money deposit with constable.

Where a warrant of commitment under a summary conviction which adjudges imprisonment is delivered to a constable, and the defendant then being at large deposits money with the constable as security for his appearance when required and procures the constable to delay execution of the commitment for a time, the defendant cannot object to a subsequent arrest, accompanied by a return of his deposit, on the ground that it was illegal as being a second arrest under the same warrant. *Semble*, an unreasonable delay in issuing a warrant of commitment may be a ground for discharge on habeas corpus if the delay works an injustice to the defendant.

EX PARTE DOHERTY, (N.B.) 94

Commitment on return of warrant of distress—Controverting justice's certificate of insufficient distress.

On a habeas corpus application under Consol. Stat., N.B., ch. 41, sec. 4, it may be shewn that a constable's return to the warrant of distress, that there was not sufficient property to satisfy it, is false, and that therefore the commitment based thereon, under which the party is imprisoned, was improperly issued.

EX PARTE FITZPATRICK, (N.B.) 191

Summary trial—Using record of conviction in lieu of warrant of commitment—Leave to put in formal commitment.

Where there has been a valid conviction on a summary trial by a magistrate, and the accused has been imprisoned thereunder without a formal warrant of commitment, in lieu of which the original record of conviction was delivered to the goaler, the Court may on

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habeas corpus allow a formal commitment to be lodged, and direct the detention of the prisoner in the meantime under sec. 752.

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Common law.

Common law offences not provided for in the Criminal Code—Jurisdiction.

Counselling a person to commit perjury is not subornation of perjury unless the perjury is actually committed, but it is punishable as an incitement to give false evidence which is an offence at common law. It is an offence at common law to offer money to a witness to testify, regardless of its truth or falsehood, to certain allegations which are false, although not shewn to be false to the knowledge of the accused, and although the proposed testimony was not in fact given. The common law jurisdiction as to crime is still operative notwithstanding the Criminal Code, but subject to the latter prevailing where there is a repugnancy between the common law and the Code. Where the charge in respect of which the accused person has been committed for trial is an offence at common law not provided for by the Code and formerly a misdemeanor, one justice of the peace may commit for trial and admit to bail as at common law.

THE KING v. COLE, (Ont.) 330

Note on procedure for offences at common law apart from the Code. 336

Commutations.

Note on pardons and commutations. 354

Compensation.

For loss of property stolen. 113

Note on restitution and compensation. 114

Concealment.

Person concealing his own goods to defraud fire insurance company—"Anything capable of being stolen."

A person is guilty of an offence under sec. 354 of the Criminal Code if he fraudulently conceals his own goods for the purpose of obtaining insurance moneys thereon, as if they had been destroyed by fire, and of then keeping the goods for his own use. The gist of the offence created by sec. 354 is the concealing for a fraudulent purpose, and it is not incumbent on the prosecution to shew that the fraudulent purpose was accomplished. The subject matter of the offence under sec. 154, i.e., "anything capable of being stolen," is not restricted to things capable of being stolen by the accused, but

Concealment—Cont.

includes anything which comes within the definition given in sec. 303 of things capable of being stolen.

THE QUEEN v. GOLDSTAUB, (Man.) 357

Fraudulent concealment of property—Abandonment for benefit of creditors—Discrepancy in statements of affairs.

In a proceeding of a penal nature involving deprivation of liberty, and brought under a provincial statute for an alleged concealment of property in fraud of creditors, the rules and principles of the criminal law as to the evidence and its effect are applicable, and there must be clear and conclusive evidence to justify a conviction. A finding that an insolvent has secreted a part of his property with the intent of defrauding his creditors is not supported by evidence merely of a discrepancy between two financial statements made by him a few months apart and the failure of the insolvent to account for the deficit in his affairs other than as being the result of an extravagant expenditure of capital in living expenses.

BEYCE v. WILKS, (Que.) 445

Note on fraudulent concealment of goods.

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Conduct.

As a false pretence. See FALSE PRETENCES.

Conspiracy.

Attempt to effect unlawful escape by force of arms; homicide.

509

Constable.

Canada Temperance Act—Order for destruction of liquor—Disqualification of constable prosecutor to execute order.

The prosecutor of a charge of keeping liquor for sale contrary to the Canada Temperance Act, being personally liable for costs in the event of the prosecution failing is, though a peace officer, disqualified from executing a search warrant or an order for the destruction of the liquor in respect of which the information was laid.

EX PARTE MCCLEAVE, (N.B.) 115

Constitutional law.

Dominion legislation extending jurisdiction of provincial court—Canada Temperance Act, R.S.C., ch. 106, sec. 103.

The Parliament of Canada has not the power to give to a Provincial Court a jurisdiction which is not within the scope of such Court's powers as established by the Provincial Legislature. Sec. 103 of the Canada Temperance Act, R.S.C. 1886, ch. 106 (amended by 51 Vict., ch. 34, sec. 6) is ultra vires of the Dominion Parliament in so far as it purports to confer jurisdiction upon Parish Court Commissioners in New Brunswick to entertain prosecution thereunder. A summary conviction by a magistrate for a third

Constitutional law—Cont.

offence under the Canada Temperance Act was quashed on the ground that one of the prior convictions relied upon was made by a Parish Court Commissioner, the jurisdiction of which Court under provincial law did not extend to such prosecutions.

EX PARTE FLANAGAN, (N.B.) 82

Pardoning power—Imprisonment in default of paying fine under provincial statute—Remission.

Fines imposed under the Montreal city charter belong to the Crown as represented by the Government of the Province of Quebec, and not to the City of Montreal, and the city has no power to remit the same. The royal prerogatives cannot be diminished or abrogated by a statute unless mentioned therein, but they may be extended by a statute in general terms. Semble, the pardoning power is an exercise of the royal prerogative, and unless a statute expressly limits such prerogative, the same is to be exercised by the Sovereign or by his representative (in Canada by the Governor-General) acting under a special delegation of power from the Sovereign, and the remission of a penalty under a provincial statute for default in payment whereof the accused is undergoing imprisonment is an exercise of the pardoning power. Semble, the Provincial Legislature of Quebec has no constitutional power to remit a fine imposed under the Montreal city charter, for default in payment of which the accused has been sentenced to imprisonment, nor could it remit or authorize the city to remit the fine in such a case were it payable to the city.

EX PARTE JOHN ARMITAGE, (Que.) 345

Conferring summary jurisdiction on justices of the peace. 17

Note on legislative power to confer jurisdiction in criminal matters. 85

See **POLICE POWERS.**

Constructive murder.

See **MURDER.**

Contempt of court.

Observations in newspaper pending suit—Application to commit.

The Court has power summarily to commit for constructive contempt notwithstanding Code secs. 290, 292, and 293 as to fair reports of court proceedings and fair comment upon public affairs; but the Court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice. A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case, is a contempt of Court. A statement to the effect that a judge of the Court having taken an active part in a general elec-

Contempt of court—Cont.

tion, would have to devote his spare moments to schooling himself into forgetfulness of his political career, is not a contempt. A statement to the effect that the spectacle of such a judge trying election cases is not edifying and that it does not produce a good impression in the public mind, is not a contempt. A party to a suit has a status to move to commit a stranger to the suit for constructive contempt, although no affidavit is filed by him or on his behalf to the effect that the alleged contempt is calculated to prejudice him in his suit. Any person may bring to the notice of the Court any alleged contempt; but, unless the offence is of so serious a nature as to make it necessary to inflict summary punishment in order to prevent interference with the course of justice, there should be no committal. **STODDARD v. PRENTICE, (B.C.)** 103

Note on contempt of court by newspaper comment.

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Conviction.

Summary conviction—Imprisonment in default of distress—Costs of distress and conveying to gaol—Variance of conviction from minute.

If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. It is unnecessary for the justice to insert in the minute of conviction any provision that the defendant shall pay such costs of distress and conveying to gaol, as a pre-requisite to his discharge from custody before the end of the term of imprisonment. The formal conviction may provide under Code sec. 872 (a) for the payment of the costs both of the distress and of conveying to gaol, although the minute of conviction does not include the costs of distress but merely directs imprisonment unless the penalty and costs, and the costs of conveying to gaol are sooner paid. The expression "costs and charges" used in Code forms WW and FFF has the same meaning as the term "expenses" in Code sec. 872 (a).

THE QUEEN v. VANTASSEL (No. 1) (N.S.) 123

Summary conviction—Imprisonment in default of distress—Costs of distress and conveying to gaol.

If the justice making a summary conviction adjudges a pecuniary penalty and distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. The omission of that provision from the formal conviction in such a case invalidates the conviction.

THE QUEEN v. VANTASSEL (No. 2) (N.S.) 133

Conviction—Cont.

Ontario Summary Convictions Act; note on procedure under. 301

Procedure for provincial offences in Ontario; statute of 1901 respecting. 566-569

And see AMENDMENT; APPEAL; CERTIORARI; DISQUALIFICATION;
HABEAS CORPUS; RESERVED CASE; SPEEDY TRIAL; STATED CASE;
SUMMARY TRIAL: SPEEDY TRIAL.

Coroner.

Summoning jurors by verbal direction only—Verbal order for post-mortem examination.

A coroner's court is a court of record, and a coroner is a judge of a court of record. A coroner has power to himself summon the coroner's jury by a mere verbal direction to the jurors. A post-mortem examination may be directed by the coroner, and proceeded with under such direction, before the impanelling of the jury. Although the surgeon making the post-mortem examination may not be bound to do so without the coroner's written direction, yet if he proceeds on a verbal direction the latter constitutes a legal justification.

DAVIDSON v. GARRETT, (Ont.) 200

Depositions before coroner—Irregular return of—Use of in cross-examination—Proof of signature.

Depositions signed by a witness at a coroner's inquest may be used on the cross-examination of that witness at the trial for the purpose of contradicting his testimony, or of testing his memory, although they were irregularly returned by the coroner to the Clerk of the Crown instead of to the magistrate. (Code sec. 568.)

THE KING v. LAURIN (No. 2), (Que.) 546

Deposition at coroner's inquest—Contradicting witness with his former deposition—Statement not purporting to be complete.

The signed deposition of a witness at a coroner's inquest may be used on the cross-examination of the witness at the homicide trial for the purpose of contradicting the witness' testimony, although it is not certified to have been read over to the deponent, and although it does not appear thereby that the deponent had no further testimony to add.

THE KING v. EDOUARD C. LAURIN (No. 3), (Que.) 548

Note on using at trial the depositions taken at a coroner's inquest. 550

Costs.

Jurisdiction over costs of appeal not perfected.

On an appeal from a summary conviction there is no jurisdiction to award costs against the appellant in respect of the proceedings in appeal at any other sittings than the one for which notice was given (Code sec. 884).

MOSHADDEN v. LACHANCE, (B.C.) 43

Costs—Cont.

Costs of distress and conveying to gaol—Non-inclusion in minute of conviction—Variance.

If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. It is unnecessary for the justice to insert in the minute of conviction any provision that the defendant shall pay such costs of distress and conveying to gaol, as a pre-requisite to his discharge from custody before the end of the term of imprisonment. The formal conviction may provide under Code sec. 872 (a) for the payment of the costs both of the distress and of conveying to gaol, although the minute of conviction does not include the costs of distress, but merely directs imprisonment unless the penalty and costs and the costs of conveying to gaol are sooner paid. The expression "costs and charges" used in Code forms WW and FFF has the same meaning as the term "expenses" in Code sec. 872 (a).

THE QUEEN v. VANTASSEL (No. 1), (N.S.) 128

Summary conviction—Imprisonment in default of distress—Costs of distress and conveying to gaol.

If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. The omission of that provision from the formal conviction in such a case invalidates the conviction.

THE QUEEN v. VANTASSEL (No. 2), (N.S.) 133

Certiorari—Costs against prosecutor and magistrate on quashing conviction—Jurisdiction—Distinction between offences under Dominion and provincial laws.

The High Court in Ontario has no jurisdiction in certiorari proceedings respecting a criminal charge under Dominion laws, to award costs against the prosecutor or the magistrate on quashing the conviction. There is jurisdiction to award costs against an unsuccessful applicant in certiorari proceedings respecting a purely criminal charge, either because of the recognizance or of an inherent power of the Court. Semble, in certiorari proceedings in respect of quasi-criminal prosecutions under Ontario statutes the provisions of the Ontario Judicature Act as to costs are applicable since the passing of the Law Courts Act (Ont.) 1896.

THE KING v. BENNETT, (Ont.) 456

Note on jurisdiction as to costs in certiorari, habeas corpus and prohibition.

459

County Judge's Criminal Court.

Court of Record—Imprisonment longer than is authorized—Habeas corpus improper—Procedure by appeal.

Habeas corpus does not lie to correct a sentence of imprisonment passed by a County Judge's Criminal Court alleged to be for a time longer than is authorized. The proper mode of procedure is by case reserved, or by appeal under Part LII. of the Code.

THE KING v. KAVANAGH, (N.S.) 507

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Cross-examination.

Cross-examination of prisoner as to previous convictions for indictable offences.

An accused person examined as a witness on his own behalf, may be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character had been adduced for the defence. The question is relevant to the issue as affecting the credibility of the accused as a witness. **THE KING v. D'Aoust, (Ont.) 407**

Note on cross-examination of accused tendering himself as a witness. **413**

Defamatory libel.

See **LIBEL**.

Deposit.

In lieu of recognizance on certiorari in Ontario. **568, 569**

Depositions.

Deposition taken at preliminary enquiry—Reading of, in evidence at trial—Evidence of absence of deponent from Canada.

Evidence that a witness at the preliminary enquiry was a corporal in the N.W. Mounted Police, that he had been sworn in as a member of "Strathcona's Horse," for active service in the South African

Depositions—Cont.

war, that he had left the post at which he had been stationed to join the latter force, and that, in the opinion of the deponent, if he had left the latter force he would have returned to such post, as in fact it would have been his duty to do, which fact would thereupon have become known to the deponent, was sufficient evidence of the absence of such witness from Canada to justify the admission as evidence at the trial of such witness taken at the preliminary enquiry. In reviewing the evidence of absence from Canada given for the purpose of admitting a deposition in evidence, the appellate Court should only consider whether such evidence was such as should reasonably satisfy a trial judge in finding the fact of absence.

THE QUEEN v. FORSYTHE, (N.W.T.) 476

Depositions before coroner—Irregular return of—Use of in cross-examination.

Depositions signed by a witness at a coroner's inquest may be used on the cross-examination of that witness at the trial for the purpose of contradicting his testimony, or of testing his memory, although they were irregularly returned by the coroner to the Clerk of the Crown instead of to the magistrate. (Code sec. 568.)

THE KING v. LAURIN (No. 2), (Que.) 546

Contradicting witness with his former deposition—Statement not purporting to be complete.

The signed deposition of a witness at a coroner's inquest may be used on the cross-examination of the witness at a homicide trial for the purpose of contradicting the witness' testimony, although it is not certified to have been read over to the deponent, and although it does not appear thereby that the deponent had no further testimony to add. THE KING v. EDOUARD C. LAURIN (No. 3), (Que.) 548

Depositions taken at a coroner's inquest; using on homicide trial. 550

Description.

Of offence of attempted theft.

63, 89

Detention.

See FURTHER DETENTION.

Disorderly house.

Inmate—Form of conviction—Summary conviction or "summary trial"—Distinction in procedure.

Where a conviction is made by a city police or stipendiary magistrate for being an inmate of a disorderly house follows the Code form WW, and does not recite that the accused was "charged" before him in the words of form QQ, the inference is that the prosecution is brought under the vagrancy clauses (207 (j) and 208) and not under the summary trials procedure, secs. 783 (f) and

Disorderly house—Cont.

788. (Per Townshend, J.) Where the proceedings are taken under the "summary convictions" procedure, a conviction inflicting a punishment in excess of that authorized on summary conviction cannot be supported in habeas corpus proceedings as a conviction on "summary trial" under which the punishment inflicted is authorized, notwithstanding that the magistrate was one authorized to hold a summary trial, and that the offence was of the class for which the consent to such trial is dispensed with by statute. (Per Townshend, J.) As there is an appeal from a summary conviction on such a charge, and none from a conviction on summary trial, a strict construction of the proceedings is required in favour of the preservation of the right of appeal. (Per Townshend, J.) An application for the prisoner's discharge on the return of a writ of habeas corpus may after refusal by one Judge in Chambers, be renewed before another Judge in Chambers, and the latter may grant a discharge notwithstanding its refusal by a judge of co-ordinate jurisdiction. (Per Townshend, J.)

THE KING v. LAURA CARTER, (N.S.) 401

Disqualification.

Disqualification of justice—Bias—Transient trader's license by-law—Rival business.

A magistrate who is engaged in the same kind of business as a trader prosecuted under a transient trader's license law is thereby disqualified from adjudicating upon the charge.

THE KING v. LEESON, (Ont.) 184

Justices of the peace—Interest—Membership in temperance alliance—Canada Temperance Act.

Justices of the peace, who belong to an association (a temperance alliance) of which the president is the party prosecuting, and to which association any fine to be imposed upon the accused for the offence against the liquor law with which he is charged would be paid under resolution of the municipal council, are disqualified from trying the charge, and will be prevented by a writ of prohibition from so doing. The fact that between the time when the information was received by such justices and the hearing of the charge, the justices had withdrawn from the association does not validate the proceedings.

DAIGNEAULT v. EMERSON, (Que.) 534

Domicile.

Meaning of "temporarily domiciled."

143

Dying declaration.

When admissible in evidence—Sense of impending death—Scope of declaration.

Proof of a dying declaration in a homicide case must be restricted to the transaction from which the death ensued but may include all

Dying declaration—Cont.

facts immediately connected therewith, and a statement of the circumstances which immediately preceded the fatal injury. That part of a dying declaration which states a distinct transaction not immediately connected with the homicide is not admissible in evidence. A dying declaration is admissible in evidence either for the prosecution or for the prisoner in a homicide case. To admit a dying declaration in a homicide case it is requisite that the declarant must have been not only in actual danger of death, but must have had a sense or conviction that his death was impending.

THE KING v. LAURIN (No. 1), (Que.) 324

Dying declaration as evidence on a homicide charge; note on. 328

Election.

Election of trial without jury—No right to re-elect.

Where a prisoner on arraignment before the County Court Judge elects in favour of a speedy trial under Part LIV. of the Code, he cannot withdraw the election so made and obtain a trial by jury. Sub-sec. 5 of Code sec. 767, as amended 1900, gives the accused the right of re-election only in case his first election was for trial by jury.

THE KING v. KEEFER, (Ont.) 122

Note on electing mode of trial; speedy trial procedure. 126

Evidence

Several defendants—Calling co-defendant as witness.

One co-defendant cannot be called as a witness by another co-defendant and compelled to give evidence, but a co-defendant may testify if he chooses to do so.

THE QUEEN v. CONNORS, (Que.) 70

Evidence to obtain extradition. 251

Of prisoner's character; admissibility. 493, 503

Deposition taken at preliminary enquiry; proof of witness' absence from Canada. R. v. FORSYTHE (N.W.T.) 475

Limitation of number of witnesses giving professional or expert testimony. 559

And see COMMISSION; CROSS-EXAMINATION; PRESUMPTION; WITNESS.

Extradition

Intercolonial extradition—Fugitive Offenders' Act, R.S.C., ch. 143—Special power on habeas corpus to review the evidence.

The effect of secs. 9 and 10 of the Fugitive Offenders' Act, R.S.C. ch. 143, is to confer a special power upon the Court hearing a habeas corpus application thereunder to review the evidence upon which the commitment for intercolonial extradition is founded. No certiorari is required in aid of the writ of habeas corpus in cases

Extradition—Cont.

under the Fugitive Offenders' Act, because the effect of secs. 10 and 17 thereof is to put the Court in possession of the whole of the record and evidence. Extradition from Canada to another British possession will not be confirmed on habeas corpus unless a *prima facie* case of guilt is made out to the satisfaction of the Superior Court to which the accused makes application for his discharge, irrespective of the decision of the committing magistrate. The enquiry under sec. 10 of the Fugitive Offenders' Act and the power to discharge the accused in trivial cases, etc., is practically unlimited, and the Court on habeas corpus may in the exercise of its discretion order a discharge for any reason which appears to it to be satisfactory. It is not necessary to order inter-colonial extradition for the purpose of having a jury determine the controverted facts, if a *prima facie* case is not made out, and if, in consequence, an acquittal might at a trial be properly directed by the trial judge.

THE QUEEN v. JOHN DELISLE, (Que.) 210

Proof of foreign law—Presumption as to crimes of like designation—Onus of proof—Collateral attack.

In the absence of evidence to the contrary, it should be assumed that the crime of "child-stealing" referred to in the extradition convention between Great Britain and the United States is identical with the offence so designated by Canadian law. It is competent for the prisoner in extradition proceedings to shew that the crime of "child stealing" under the foreign law was not covered by the facts disclosed on the depositions, and where such is shewn the prisoner should be discharged. The child's own father may be guilty of child stealing within sec. 284 of the Code, if after a divorce by a court of competent jurisdiction and the award thereon of the custody of the child to the mother, the father wilfully removes the child from her custody. An objection by the husband to the validity of the divorce on the ground of collusion, cannot, where the collusion is denied on oath, be adjudicated upon by the extradition commissioner, but extradition should be ordered notwithstanding such objection and the prisoner left to his right to contest the divorce decree at his trial by the foreign court.

THE KING v. WATTS, (Ont.) 246

Committal for extradition—Bail pending habeas corpus—Remand—Renewing bail pending appeal.

Under ordinary circumstances bail should not be granted to a person committed for extradition. Where bail was granted to the accused in extradition proceedings pending a habeas corpus application on his behalf, and afterwards the application for his discharge under habeas corpus was refused, the accused must surrender himself into close custody before a fresh application will be entertained

Extradition—Cont.

to bail him pending an appeal from the order refusing his discharge. RE WATTS, (Ont.) 538

Assault with intent to commit murder—Proof of intent—Evidence must justify committal for trial for the extradition crime.

In extradition proceedings for the offence of assault with intent to commit murder, the prosecution must prove such intent as well as the assault, and a committal for extradition is only authorized where the evidence, had the crime been committed in Canada, would have justified a "committal for trial" for the extradition crime charged and not merely for a less serious offence included therein.

RE KELLY, (N.B.) 541

Note on evidence to obtain extradition. 251

Note on prosecution for other offences. 539

Note on question of bail. 540

Extradition convention between Great Britain and the United States of America, 1901, text of. 554

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Crimes made extraditable by the Convention of 12 July, 1889, between Great Britain and the United States of America. 556

Crimes extraditable under the Ashburton Treaty of 1842. 556

False pretences

False pretence by conduct—Cr. Code, sec. 358.

A person who is present when a false representation is made by another person acting in conjunction with him, and who knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences. THE QUEEN v. CADDEN, (N.W.T.) 45

Note on false pretence by conduct; Cr. Code, sec. 358. 50

Fees

None to magistrate where charge of indictable offence not triable summarily. 312

Fine

See CONVICTION.

REMISSION.

Fire prevention

Municipal law—By-law regulating storage of petroleum products, coal oil, naptha, etc.—Concurrent Dominion legislation.

Coal oil, crude oil and naptha are "combustible or dangerous materials" within the meaning of the Ontario Municipal Act, sec. 542, which authorizes the passing of by-laws for fire prevention regu-

Fire prevention—Cont.

lating the keeping and storing of "gunpowder and other combustible or dangerous materials. Municipal regulations of a merely local character, made in exercise of police powers for the prevention of fires and authorized by provincial legislation, are not invalid as to the storage of petroleum and its products because of Dominion revenue laws dealing with such storage, nor are they an interference with "trade and commerce" within the meaning of the British North America Act.

THE KING v. MCGREGOR, (Ont.) 485

Fisheries

Fishing in Canada by foreigners—"Temporarily domiciled."

An appeal lies under Code sec. 879 from a conviction made under the Fisheries Act, R.S.C. ch. 95, sec. 18, notwithstanding the special appeal provided by that Act. The special appeal, which under the Fisheries Act may be made to the Minister of Marine and Fisheries, may be taken after the disposal of an appeal to a County Court. A foreigner coming to Canada for successive seasons on fishing trips and occupying for a few weeks only in each year a building he has erected for use as a fishing camp is not a person "temporarily domiciled" in Canada under the Fisheries Act, and the Order in Council passed in pursuance thereof.

THE KING v. TOWNSEND; THE KING v. MURTAGH, (N.S.) 143

Regulations under the Fisheries Act (Canada), Order in Council of 12th April, 1902.

558

Former acquittal

See AUTÉFOIS ACQUIT

Fraud

See FALSE PRETENCES.

Fraudulent conversion

See THEFT.

Fraudulent removal

Evidence of removal or taking—Removal of part a month prior to date charged in count—Separate transactions.

A conviction on a charge of fraudulent concealment of goods with intent to defraud an insurance company will not be set aside because it appears in evidence that a part of the goods had been removed a month before the date of removal of the remainder, which latter removal took place on the date charged in the indictment as the date of concealment. The date of removal is not necessarily the date of concealment, and the conviction would be valid if the accused were still keeping the goods in concealment on or about the date charged in the count, although the removal took place a month prior thereto. On a further count for fraudulent

Fraudulent removal—Cont.

removal of goods with intent to defraud, a removal of part of the goods a month prior to the time of the offence as charged is not to be presumed to be a part of one continuous taking with the removal of the remainder on the date charged. Although evidence of the first taking was admissible to shew the intent on the second taking which constituted the charge against the accused, the Judge should not have told the jury that they could convict for either the first or the second taking or for both, and the Judge having certified his opinion that the jury were materially influenced by the evidence of the first taking the conviction on the count for fraudulent removal should be set aside.

THE KING v. HURST, (Man.) 338

Person concealing his own goods to defraud fire insurance company—"Anything capable of being stolen."

A person is guilty of an offence under sec. 354 of the Criminal Code if he fraudulently conceals his own goods for the purpose of obtaining insurance moneys thereon, as if they had been destroyed by fire, and of then keeping the goods for his own use. The gist of the offence created by sec. 354 is the concealment for a fraudulent purpose, and it is not incumbent on the prosecution to shew that the fraudulent purpose was accomplished. The subject matter of the offence under sec. 354, i.e., "anything capable of being stolen," is not restricted to things capable of being stolen by the accused, but includes anything which comes within the definition given in sec. 303 of things capable of being stolen.

THE QUEEN v. GOLDSTAUB, (Man.) 357

Fruit Marks Act

Regulations under the Fruit Marks Act of 1901.

557

Fugitive offenders

See EXTRADITION.

Further detention

Original conviction in lieu of warrant of commitment.

Where the conviction itself was lodged with the gaoler as his authority for the detention in lieu of a warrant of commitment, the Judge before whom the prisoner is brought upon habeas corpus may properly order the further detention of the prisoner for a limited time until a warrant in due form can be obtained from the magistrate.

THE KING v. MORGAN, (Ont.) 63

Gaming

Common betting-house—Horse racing—Incorporated association.

The exemption contained in Code sec. 204 (2) as to bets made on the race course of an incorporated association during a race meeting is not to be read into secs. 197 and 198 as to the offence of

Gaming—Cont.

keeping a common betting-house. It is an offence under the Criminal Code to keep a common betting-house whether or not it is kept on the race course of an incorporated association, and is operated only during the actual progress of a race meeting.

THE KING v. HANRAHAN, (Ont.) 430

General sessions

Custody of records by Clerk of the Peace in Ontario. 1

Note on certificates of acquittal. 8

Grievous bodily harm

Conviction and commitment—Describing the offence—Unnecessary to state that an act was “unlawfully” done.

A conviction for innicting grievous bodily harm under Code sec. 242 which provides a punishment for the person “who unlawfully wounds or inflicts any grievous bodily harm upon any other person” need not state that the act was done “unlawfully,” that term in the section being referable only to the offence of wounding.

THE KING v. TREADWELL, (N.S.) 461

Habeas corpus

Warrant of commitment—Delay of execution.

Semble, an unreasonable delay in issuing a warrant of commitment may be a ground for discharge on habeas corpus if the delay works an injustice to the defendant.

EX PARTE DOHERTY, (N.B.) 94

Proceedings certified without certiorari—Discharge on habeas corpus—Subsequent motion to quash.

A motion to quash a summary conviction cannot be entertained by a Superior Court without a writ of certiorari for that purpose and a return to such writ. Where on a habeas corpus application the magistrate is directed by an order to return the proceedings relating to the imprisonment and thereupon returns under such order the information, depositions and conviction, such conviction is not by reason thereof brought under the jurisdiction of the Superior Court for the purpose of a motion to quash the same.

THE KING v. MACDONALD (No. 2), (N.S.) 279

Summary conviction—Appeal—Subsequent habeas corpus proceedings.

The decision of the Court of General Sessions or County Court in appeal from a summary conviction is final and conclusive, and a Superior Court has no jurisdiction to interfere by habeas corpus.

THE KING v. BEAMISH, (B.C.) 388

Successive applications.

An application for the prisoner's discharge on the return of a writ of habeas corpus may after refusal by one Judge in Chambers,

Habeas corpus—Cont.

be renewed before another Judge in Chambers, and the latter may grant a discharge notwithstanding its refusal by a Judge of co-ordinate jurisdiction. **THE KING v. LAURA CARTER, (N.S.)** 401
 County Court Judge's Criminal Court—Court of Record—Illegal sentence.

Habeas corpus does not lie to correct a sentence of imprisonment passed by a County Court Judge's Criminal Court alleged to be for a time longer than is authorized. The proper mode of procedure is by case reserved or by appeal under Part LII. of the Code.

THE KING v. KAVANAGH, (N.S.) 507

Note on invalid commitments; regularity of conviction. 66

Special powers under Fugitive Offenders' Act; inter-colonial extradition. 210

Note on habeas corpus; successive applications. 245

Homicide

Note on bail in homicide cases; Cr. Code secs. 603, 604. 232

And see **MANSLAUGHTER.**

MURDER.

Horse racing

Race meeting of an incorporated association—Exemption as to betting.

The exemption contained in Code sec. 204 (2) as to bets made on the race course of an incorporated association during a race meeting is not to be read into secs. 197 and 198 as to the offence of keeping a common betting-house. It is an offence under the Criminal Code to keep a common betting-house whether or not it is kept on the race course of an incorporated association, and is operated only during the actual progress of a race meeting.

THE KING v. HANRAHAN, (Ont.) 430

Identity

Of stolen property, proof of. to obtain restitution 113, 114

Imprisonment.

See **COMMITMENT.**

Incriminating answers.

See **WITNESS.**

Indian Act.

An illegal sale of liquor to an Indian by a hotel cook or other employee unauthorized by the proprietor to sell liquors is not, in the absence of any knowledge or connivance on the part of the proprietor, a sale "by his clerk, servant or agent," so as to render the proprietor liable to the penalty imposed by the Indian Act, R.S.C. 1886 ch. 43, sec. 94, as amended by 51 Vict. ch. 22, sec. 4.

THE KING v. MICHAEL GEE (B.C.) 148

Indictment

Particulars—Defect cured by verdict.

An indictment for selling under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property (Code sec. 309), but particulars will be ordered as to the date, nature or purport of the alleged power of attorney.

The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a reserved case as to whether a verdict of guilty on such indictment was valid or not.

A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property (Code sec. 309), but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a reserved case as to whether a verdict of guilty on such indictment was valid or not. A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed.

THE QUEEN v. FULTON, (Que.) 36

Describing the offence—Attempted theft from a person unknown.

An indictment, charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person, without giving the name of the person against whom the offence was committed, or the description of the property the accused attempted to steal, is sufficient.

THE QUEEN v. TAYLOR, (Que.) 89

Count to be for one offence only; continuous acts.

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Information

Piratical act—Charge against seaman not a British subject—Consent of Governor-General to laying information.

Information—Cont.

Per Ritchie, J., and Weatherbe, J.—A charge against a seaman not a British subject on a British ship for inciting a revolt upon the ship while on the high seas cannot, if taken only under Code sec. 128, be made without the consent of the Governor-General under sec. 542 obtained prior to the laying of the information. Per Ritchie, J.—If the proceedings for the offence are taken under the Merchant Shipping Act, 1894 (Imp.), sec. 686, the consent of the Governor-General is not required, and Code sec. 542 would not apply. Per Weatherbe, J.—Code sec. 542 applies to the procedure in Canadian courts in respect of offences committed within the Admiralty jurisdiction whether the proceedings are taken under the Criminal Code or the Imperial Merchant Shipping Act or the Admiralty Offence Act, 1849 (Imp.).

THE KING v. HECKMAN, (N.S.) 242

Mandamus to justices to take.

307

Insolvency

Fraudulent concealment of property—Quasi-criminal proceedings under provincial law—Application of rules of criminal evidence.

In a proceeding of a penal nature involving deprivation of liberty, and brought under a provincial statute for an alleged concealment of property in fraud of creditors, the rules and principles of the criminal law as to the evidence and its effect are applicable, and there must be clear and conclusive evidence to justify a conviction. A finding that an insolvent has secreted a part of his property with the intent of defrauding his creditors is not supported by evidence merely of a discrepancy between two financial statements made by him a few months apart, and the failure of the insolvent to account for the deficit in his affairs other than as being the result of an extravagant expenditure of capital in living expenses.

BRYCE v. WILKS, (Que.) 445

Intent

Drugs for procuring miscarriage—Unlawful advertisement—Label with caution against use—Interpretation.

On a charge under Code sec. 179 (c) of advertising a medicine intended or represented as a means of causing miscarriage, and in support of which the printed advertisement alone is relied on, the words of the advertisement must be taken in their natural and primary sense, with the same strictness as in a case of criminal libel. Without proof of the ingredients of a medicine advertised as a "female regulator," or other proof of the intent for which the medicine was sold, it should not be inferred from the fact that it was labelled with a printed "caution" against the use of the medicine during pregnancy, that it was intended or represented as a means of causing miscarriage.

THE KING v. KARN, (Ont.) 543

Intent—Cont.

Assault with intent to murder.

541

Interpretation.

Note on interpretation of criminal statutes.

363

“Part” headings of Code; effect of.

372

Jurisdiction

Adjournment of hearing—Summary proceedings.

The Dominion Parliament has jurisdiction to confer upon justices of the peace appointed under provincial authority jurisdiction to summarily try criminal offences. Sec. 103 of the Canada Temperance Act, R.S.C. (1886), ch. 106, as amended 51 Vict., ch. 34, sec. 6, enabling any two justices of the peace to adjudicate upon prosecutions under that Act, is *intra vires* of the Parliament of Canada. On the return of a summons in a summary proceeding before justices of the peace, the person summoned must wait a reasonable time after the hour named in the summons, when the justices are at that hour engaged in other official business.

THE KING v. WIPPER, (N.S.) 17

Changing preliminary enquiry into summary proceeding.

It is not competent for magistrates where an information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it on the original information.

THE KING v. DUNGEY, (Ont.) 38

Continuity of acts—Offence completed in another judicial district.

The offence of fraudulent conversion of the proceeds of a valuable security, mentioned in Code sec. 308, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district.

THE KING v. HOGLE, (Que.) 53

Canada Temperance Act—Information before one magistrate and trial before another—Invalidity.

Sec. 104 of the Canada Temperance Act, as amended 1888, ch. 34, has the effect of giving to a police or stipendiary magistrate before whom an information was laid the exclusive jurisdiction to try the case, and a conviction made by another stipendiary magistrate on the same information is void. Where such an information and conviction thereon are produced in a subsequent prosecution as proof of a previous conviction (C.T. Act, sec. 115 (b)), the record of conviction is of no more force than if signed by one who had

Jurisdiction—Cont

ceased to be a magistrate before the date thereof, and is not evidence. A defendant imprisoned on a conviction for a third offence under the Canada Temperance Act is entitled to be discharged on habeas corpus if the conviction relied upon as proving a previous conviction for a second offence was made by a police or stipendiary magistrate irregularly proceeding under and by virtue of an information in respect of such second offence laid before another police or stipendiary magistrate or magistrate vested with the authority of two justices.

THE KING v. MACDONALD, (N.S.) 97

Locality of crime—Territorial jurisdiction of magistrate—Ontario Sheep Protection Act—Owning various dogs.

The offence under the Ontario Sheep Protection Act of possessing a dog which has worried sheep is committed in the district in which the owner of the dog resides and where the dog is ordinarily kept, notwithstanding that the sheep worrying may have taken place in another district. A justice of the peace has no jurisdiction to try a charge in respect of such an offence alleged to have been committed in an incorporated town having a police magistrate of its own, except in the event of the latter's illness, absence or request (R.S.O. 1897, ch. 87, sec. 7). Semble, a justice of the peace may try a complaint under that statute for the recovery of damages if he has jurisdiction in the district in which the sheep were killed or injured.

THE KING v. DUERING, (Ont.) 135

Stipendiary magistrate—Territorial jurisdiction—"Whole of the county"—When incorporated town included.

Where a statute declares that the jurisdiction of a county stipendiary magistrate shall extend throughout the "whole of the county," it is to be construed as including jurisdiction in any incorporated town within the county limits notwithstanding the fact that there is a stipendiary magistrate for such town alone, unless the latter's jurisdiction is made exclusive.

THE KING v. GIOVANETTI, (N.S.) 157

Certiorari for want of jurisdiction—Double remedy of certiorari and appeal—Discretion.

Certiorari and not appeal is the appropriate remedy to raise the question of want of jurisdiction, *ex. gr.*, whether proper service has been made and jurisdiction over the person acquired, or whether the justice was disqualified through interest. A statutory provision taking away the right to a certiorari does not deprive the Superior Court of its power to issue the writ to quash a proceeding on the ground of want of jurisdiction. When there is a defect in the jurisdiction of justices or inferior courts, the common law right of certiorari should not be refused merely because a new trial

Jurisdiction—Cont.

might be had by means of an appeal. Even where an appeal is pending, a certiorari for want of jurisdiction should not be refused unless the question of jurisdiction is being raised on the appeal.

RE RUGGLES, (N.S.) 163

Certiorari—Costs against prosecutor and magistrate on quashing conviction—Distinction between offences under Dominion and provincial laws.

The High Court in Ontario has no jurisdiction in certiorari proceedings respecting a criminal charge under Dominion laws, to award costs against the prosecutor or the magistrate on quashing the conviction. There is jurisdiction to award costs against an unsuccessful applicant in certiorari proceedings respecting a purely criminal charge either because of the recognizance or of an inherent power of the Court. Semble, in certiorari proceedings in respect of quasi-criminal prosecutions under Ontario statutes the provisions of the Ontario Judicature Act as to costs are applicable since the passing of the Law Courts Act (Ont.) 1896.

THE KING v. BENNETT, (Ont.) 456

Want of, over subject matter. 365

Note on legislative power to confer jurisdiction in criminal matters. 85

Of Parish Court Commissioners (N.B.); Canada Temperance Act. 82

Proceedings certified on habeas corpus; application to quash without certiorari. 279, 300

Quebec statute (2 Edw. VII., ch. 19) respecting the Judges of the Sessions of the Peace for the City of Montreal. 564

And see DISQUALIFICATION.

PRELIMINARY ENQUIRY.

Jury

See ELECTION.

Justices of the Peace

See JURISDICTION.

PRELIMINARY ENQUIRY.

Juvenile offenders

Sentence and detention of in Nova Scotia. 560, 563

Libel

Plea of justification—Witnesses out of Canada—Commission to take evidence.

A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence

Libel—Cont.

relates wholly to a plea of justification just entered on record. An order for a commission to take such evidence should not be made before plea.

THE QUEEN v. NICOL, (B.C.) 31

Contempt of Court; newspaper comment.

103, 110

License

See LIQUOR LICENSE.

Limitation

Time for commencing prosecution—Incorporation of procedure under Criminal Code—R.S.O. 1897, ch. 90, sec. 2.

The effect of sec. 2 of the Ontario Summary Convictions Act (R.S.O. 1897, ch. 90) is to incorporate sec. 841 of the Criminal Code which limits the time within which the summary proceedings shall be commenced to six months after the offence was committed, unless otherwise specially provided. A summary prosecution in Ontario for erecting, putting up and placing within the fire limits of a town a wooden building contrary to a municipal by-law is barred if a complaint is not laid until after the expiration of six months following the date of the offence.

THE KING v. MCKINNON, (Ont.) 301

Time for application for certiorari, within six months under Ontario statute.

570

Liquor license

Unlicensed hotel—Lease of bar—Collusive arrangement to defeat statute.

An hotel proprietor is properly convicted as a principal for the offence of selling intoxicating liquors without a license, notwithstanding that the sale was made under cover of a lease of the bar-room made by him to another party, if such lease be found to be a collusive arrangement to enable the lessor to obtain the profits and advantages of the illegal sale of liquor therein without a license.

THE QUEEN v. LEARMONT, (N.S.) 151

Inspector's exemption from costs.

On a prosecution under a Liquor License Act by a license inspector and an appeal by the defendant from the conviction obtained, costs will not be awarded to the inspector on the dismissal of the appeal, if by statute he is exempt from liability to pay costs had the decision been against him.

THE QUEEN v. LEARMONT, (N.S.) 151

Unlawfully selling liquor without license—Statutory presumption—Rebuttal.

Where, under a liquor license law, the statute makes proof of the fact of sale by a person who is "suffered to be in or upon the

Liquor license—Cont.

premises" presumptive evidence that the sale took place with the authority and by the direction of the occupant of the premises, and declares that the burden of proof that the sale took place without the occupant's authority or direction shall be thrown upon such occupant, a conviction of the latter will be supported if the facts appear which give rise to the statutory presumption, notwithstanding the express denial under oath by the accused that he had given any authority or direction to sell, or that he knew of the sale being made. The magistrate trying such a charge may give effect to the statutory presumption as against the unqualified denial by the accused under oath, if he does not give credence to such denial; and the accused can only be said to have satisfied the burden of proof, which the statute casts upon him, when his denial is believed.

THE KING v. ANDREW CONBOD, (N.S.) 414

Statutory presumptions; Ontario Liquor License Act; note. 430

Locality of crime

As affecting jurisdiction of justices to hold preliminary enquiry (RE THE QUEEN v. BURKE). 29

See PRELIMINARY ENQUIRY.

Magistrate

See JURISDICTION; POLICE MAGISTRATE; SUMMARY TRIAL.

Malicious prosecution

Record of acquittal; proving an action for. 1

Mandamus

Mandamus to justices to take information—Civil procedure.

An application for a mandamus against a magistrate is a civil and not a criminal proceeding, although the act which it is proposed the justice shall be ordered to do is the taking of an information for an offence against the criminal law. The procedure upon such applications in Ontario is governed by the Ontario Judicature Act, and the application for an order absolute must be made to a single Judge in Court and not to a Divisional Court.

THE KING v. MEEHAN (No. 1), (Ont.) 307

Mandamus to compel a "preliminary enquiry."

The Court will not grant to the prosecutor a mandamus to compel a re-hearing by the magistrate of an application for process in respect of an indictable offence, if the magistrate has exercised his discretion (although erroneously) in refusing the process after being put in possession of the facts on which he can exercise discretion. If the magistrate on an application for process erroneously holds that the offence is not indictable, and that he therefore has no jurisdiction to hold a preliminary enquiry in respect thereof, a mandamus will lie to compel him to do so.

THE KING v. MEEHAN (No. 2), (Ont.) 312

Manslaughter

Ship collision—Negligence—Reckless disregard of human life.

It is not necessary to order inter-colonial extradition for the purpose of having a jury determine the controverted facts, if a *prima facie* case is not made out, and if, in consequence, an acquittal might at a trial be properly directed by the trial Judge. On a charge of manslaughter against the master of a ship in respect of a collision resulting in loss of life, such recklessness must appear as will amount to a wilful attempt upon the lives of people in putting them to danger, and not merely an error of judgment.

THE QUEEN v. JOHN DELISLE, (Que.) 210

Self-defence—Charge of manslaughter—Committal for trial—Bail.

Where a prisoner committed for trial on a charge of manslaughter would ordinarily be admitted to bail, bail will not be refused because the Crown prosecutor swears to a belief that he can prove the offence to have been murder.

THE KING v. SPICER, (N.S.) 229

Note for parents' neglect to supply medical aid to child. 378

Medical attendance

Criminal liability to supply; Cr. Code secs. 209, 210. 372

Note on neglect to supply. 378

Mens rea

See INTENT.

Merchandise marks

Statute of 1902 amending the Act respecting packing and sale of certain staple commodities. 562

Montreal charter

Imprisonment in default of paying fine—Remission—Royal prerogative.

Fines imposed under the Montreal City Charter belong to the Crown as represented by the government of the Province of Quebec, and not to the City of Montreal, and the city has no power to remit the same. The royal prerogatives cannot be diminished or abrogated by a statute unless they are expressly mentioned therein, but they may be extended by a statute in general terms. *Semble*, the Provincial Legislature of Quebec has no constitutional power to remit a fine imposed under the Montreal City Charter, for default in payment of which the accused has been sentenced to imprisonment, nor could it remit or authorize the city to remit the fine in such a case were it payable to the city.

EX PARTE JOHN ARMITAGE, (Que.) 345

Municipal law

See BY-LAW.

POLICE POWERS.

TRANSIENT TRADERS.

Murder

Constructive murder—Conspiracy—Attempt to effect unlawful escape by force of arms—Evidence of common design.

Where a package of revolvers was thrown into a carriage in which three prisoners conjointly charged with a crime were being conveyed under lawful arrest and the prisoners all struggled to obtain revolvers, two of them succeeding in doing so, whereupon all of them attempted to effect a forcible escape during which one of the peace officers was shot dead by one of the prisoners, but by which of them is unknown, proof that the defendant had one of the revolvers in the melee and had ordered another of the peace officers present to "give up" immediately after another of the prisoners had told the defendant to "give it to him" is, with such facts, sufficient evidence of a conspiracy by the three prisoners for an unlawful purpose, to wit, the escape, and of a common design to use for its accomplishment any amount of violence and force; and a conviction of the defendant for murder is, therefore, proper without proof that he fired the fatal shot. It was proper for the trial Judge to instruct the jury that "where all the parties proceed with the intention to commit an unlawful act and with the resolution or determination to overcome all opposition by force, that if by reason of such resolution one of the party is guilty of homicide, his companions would be liable to the penalty which he has incurred." The shooting of the constable by one of the conspirators, in the prosecution of such common purpose was an act which was or ought to have been known to be a probable consequence of prosecuting such purpose, and each of the conspirators become under Cr. Code sec. 61 (2) a party to the homicide.

THE KING v. RICE, (Ont.) 509

Dying declaration as evidence; scope of declaration. 324

Note on evidence by dying declaration. 328

And see BAIL.

MANSLAUGHTER.

Necessaries

Neglect to provide necessaries for child—Medical attendance and remedies as "necessaries."

Medical attendance and remedies are necessaries within the meaning of secs. 209 and 210 of the Criminal Code and any one legally liable to provide such is criminally responsible for neglect to do so, as well under the common law as under the Code. Conscientious be-

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Necessaries—Cont.

lief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse. The Part headings of the Criminal Code have the same effect as preambles to statutes and the heading "Duties tending to the preservation of life" prefixed to Part XVI. is to be regarded in the construction of the Code sections contained in that Part. The terms "necessaries of life" and "necessaries" in secs. 209 and 210 mean such necessities as tend to preserve life.

THE KING v. BROOKS, (B.C.) 372

New trial

Failure of prisoner's counsel to object—Duty of judge in criminal case to exclude illegal evidence.

The prosecution is not entitled to give evidence of the prisoner's bad character, unless or until the prisoner adduces evidence to prove his good character, either by examining his own witnesses on that point or by questioning the Crown witnesses thereon as a part of their cross-examination. A new trial will be ordered where such evidence is wrongly admitted against the prisoner, although no objection was raised to it by the prisoner's counsel.

THE KING v. WILLIAM LONG, (Que.) 403

See RESERVED CASE.

Notice of appeal

See APPEAL.

Obstruction

Obstructing a peace officer in execution of his duty—Jurisdiction of two justices.

The offence of obstructing a peace officer in the performance of his duty, where an assault upon the officer is not also charged, may be summarily tried by two justices of the peace or a police magistrate (sec. 541) under the Summary Convictions Part of the Code (LVIII.) by virtue of sec. 144; and the latter section is not controlled by the provisions of secs. 783 and 788 as to the summary trial of the like offence before a magistrate with the consent of the accused. In such case the punishment is limited to that specified in sec. 144 and sec. 788 providing a different punishment on a trial before a magistrate with the consent of the accused does not apply. The consent of the accused is not necessary to the jurisdiction of two justices to try the offence under sec. 144. Semble, if the charge were for an assault of the officer in performance of his duty, secs. 783 and 788 would then apply, and not sec. 144. In the Province of British Columbia the magistrate has absolute jurisdiction to proceed under the Summary Trials Part (LV.) by sec. 784 (3) without the consent of the accused, and to award both fine and imprisonment under sec. 788.

THE KING v. JACK (No. 2), (B.C.) 304

One offence

Fraudulent concealment and removal of goods—Count to be for one offence only—Separate transactions.

A conviction on a charge of fraudulent concealment of goods with intent to defraud an insurance company will not be set aside because it appears in evidence that a part of the goods had been removed a month before the date of removal of the remainder, which latter removal took place on the date charged in the indictment as the date of concealment. The date of removal is not necessarily the date of concealment, and the conviction would be valid if the accused were still keeping the goods in concealment on or about the date charged in the count, although the removal took place a month prior thereto. On a further count for fraudulent removal of goods with intent to defraud, a removal of part of the goods a month prior to the time of the offence as charged is not to be presumed to be a part of one continuous taking with the removal of the remainder on the date charged.

THE KING v. HURST, (Man.) 338

Packing of staple commodities

Act of 1902 respecting.

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Pardons

Pardoning power—Imprisonment in default of paying fine under provincial statute—Remission.

Fines imposed under the Montreal City Charter belong to the Crown as represented by the government of the Province of Quebec, and not to the City of Montreal, and the city has no power to remit the same. The royal prerogatives cannot be diminished or abrogated by a statute unless they are expressly mentioned therein, but they may be extended by a statute in general terms. *Semble*, the pardoning power is an exercise of the royal prerogative, and unless a statute expressly limits such prerogative, the same is to be exercised by the Sovereign or by his representative (in Canada by the Governor-General) acting under a special delegation of power from the Sovereign, and the remission of a penalty under a provincial statute for default in payment whereof the accused is undergoing imprisonment for an exercise of the pardoning power. *Semble*, the Provincial Legislature of Quebec has no constitutional power to remit a fine imposed under the Montreal City Charter, for default in payment of which the accused has been sentenced to imprisonment, nor could it remit or authorize the city to remit the fine in such a case were it payable to the city.

EX PARTE JOHN ARMITAGE, (Que.) 345

Note on pardons and commutations.

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Parents

Neglect to supply medical aid for child.

372, 378

Particulars

Stealing under power of attorney; order for particulars. (R. v. FULTON.

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Peace officer

See CONSTABLE.

Penalty

See REMISSION.

Perjury

Inciting to give false evidence—Subornation of perjury—Common law offences.

Counselling a person to commit perjury is not subornation of perjury unless the perjury is actually committed, but it is punishable as an incitement to give false evidence which is an offence at common law. It is an offence at common law to offer money to a witness to testify regardless of its truth or falsehood, to certain allegations which are false, although not shewn to be false to the knowledge of the accused, and although the proposed testimony was not in fact given. The common law jurisdiction as to crime is still operative notwithstanding the Criminal Code, but subject to the latter prevailing where there is a repugnancy between the common law and the Code. Where the charge in respect of which the accused person has been committed for trial is an offence at common law not provided for by the Code and formerly a misdemeanor, one justice of the peace may commit for trial and admit to bail as at common law.

THE KING v. COLE, (Ont.) 330

Piracy

Piratical act—Revolt in British ship—Charge against seaman not a British subject—Consent of Governor-General to laying information.

Per Ritchie, J., and Watherbe, J.—A charge against a seaman not a British subject on a British ship for inciting a revolt upon the ship while on the high seas cannot, if taken only under Code sec. 128, be made without the consent of the Governor-General under sec. 542 obtained prior to the laying of the information. Per Ritchie, J.—If the proceedings for the offence are taken under the Merchant Shipping Act, 1894 (Imp.), sec. 686, the consent of the Governor-General is not required and Code sec. 542 would not apply. Per Weatherbe, J.—Code sec. 542 applies to the procedure in Canadian Courts in respect of offences committed within the Admiralty jurisdiction whether the proceedings are taken under the Criminal Code or the Imperial Merchant Shipping Act or the Admiralty Offence Act, 1849 (Imp.).

THE KING v. HECKMAN, (N.S.) 242

Police magistrate

Appointment of second police magistrate for Toronto, Statute of 1902 respecting.

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Police powers

Municipal law—Prevention of fires—By-law regulating storage of petroleum products, coal oil, etc.

Coal oil, crude oil and naphtha are "combustible or dangerous materials" within the meaning of the Ontario Municipal Act, sec. 542, which authorizes the passing of by-laws for fire prevention regulating the keeping and storing of "gunpowder and other combustible or dangerous materials. Municipal regulations of a merely local character, made in exercise of police powers for the prevention of fires and authorized by provincial legislation, are not invalid as to the storage of petroleum and its products because of Dominion revenue laws dealing with such storage, nor are they an interference with "trade and commerce" within the meaning of the British North America Act. *THE KING v. McCREGOR*, (Ont.) 485

Post letter

Detention of, by letter carrier—Decoy letter to fictitious address—Failure of carrier to report under post office regulations.

A decoy letter, duly stamped and placed by post office officials amongst the letters at a post office for the purpose of testing the honesty of the letter-carrier whose duty it was to deal with the same, is none the less a "post letter" because of its being directed to a fictitious address. If the carrier should fail to report the letter as required by the post office regulations, or to return it within a reasonable time to his superior officer, he would be guilty of unlawfully detaining the letter under sec. 89 of the Post Office Act R.S.C. 1886, ch. 35). Where a police officer, acting under the instructions of the post office department in investigating the alleged theft of letters by letter carriers, believed that the carrier had stolen the letter and detained and searched him, an action for false arrest does not lie in the absence of malice.

MAYER v. VAUGHAN, (Que.) 392

Preliminary enquiry

Offence committed in another county of same province—Jurisdiction of magistrate.

The power conferred on a magistrate under Code sec. 557 of ordering the accused person brought before him, charged with an offence committed out of his territorial jurisdiction, to be taken before some justice having jurisdiction in the place where the offence was committed, is permissive only. A magistrate may hold a preliminary enquiry in respect of an indictable offence committed in the same province outside of his territorial jurisdiction, if the

Preliminary inquiry—Cont

accused is, or is suspected to be, within the limits over which such magistrate has jurisdiction, or resides or is suspected to reside within such limits.

RE THE QUEEN v. BURKE, (Ont.) 29

Changing preliminary enquiry into a summary proceeding.

It is not competent for magistrates where an information charges an offence which they have no jurisdiction to try summarily, to convert the charge into one which they have jurisdiction to try summarily, and to so try it on the original information.

THE KING v. DUNGEY, (Ont.) 38

Statutory prohibition of certain acts—Public policy—Remedy by indictment.

Where the doing of a particular act is prohibited by statute on public grounds, and the statute does not declare a mode of enforcing the prohibition, the offence is indictable. A person who without lawful excuse wilfully and corruptly votes more than once at a municipal election for city aldermen by general vote under sec. 158 (a) of the Ontario Municipal Act is guilty of an indictable offence by virtue of sec. 138 of the Criminal Code (disobedience of statutes). Wrongfully voting twice at an election would not be indictable at common law unless prohibited by statute, and, semble, every contempt of a statute is indictable at common law where no other mode of punishment is provided. Where a magistrate is applied to for process in respect of an indictable offence which cannot be dealt with summarily, no fees can be demanded by him therefor. The court will not grant to the prosecutor a mandamus to compel a re-hearing by the magistrate of an application for process in respect of an indictable offence, if the magistrate had exercised his discretion (although erroneously) in refusing the process after being put in possession of the facts on which he can exercise discretion. If the magistrate on an application for process erroneously holds that the offence is not indictable and that he therefore has no jurisdiction to hold a preliminary enquiry in respect thereof, a mandamus will lie to compel him to do so.

THE KING v. MEEHAN (No. 2), (Ont.) 312

Prerogative

Pardoning power; remission of penalty under Montreal Charter. 345

Note on pardons and commutations. 354

Presumption

Statutory presumption—Rebuttal—Liquor License Act, R.S.N.S., ch. 100.

Where, under a liquor license law, the statute makes proof of the fact of sale by a person who is "suffered to be in or upon the premises" presumptive evidence that the sale took place with the

Presumption—Cont.

authority and by the direction of the occupant of the premises, and declares that the burden of proof that the sale took place without the occupant's authority or direction, shall be thrown upon such occupant, a conviction of the latter will be supported if the facts appear which give rise to the statutory presumption, notwithstanding the express denial under oath by the accused that he had given any authority or direction to sell or that he knew of the sale being made. The magistrate trying such a charge may give effect to the statutory presumption as against the unqualified denial by the accused under oath, if he does not give credence to such denial; and the accused can only be said to have satisfied the burden of proof, which the statute casts upon him, when his denial is believed.

THE KING v. ANDREW CONROD, (N.S.) 414

Statutory presumptions; Ontario Liquor License Act; note. 430

Pretence

See FALSE PRETENCES.

Previous conviction

Note on proof of previous conviction; Canada Temperance Act, sec. 115 (a). 189

Statutory interrogation as to, under Canada Temperance Act; interrogation of solicitor for accused. 187

Prisoner

As a witness. 407

Note on cross-examination of accused tendering himself as a witness. 407

Prisons

Statutes respecting Halifax Industrial School, 1902. 560, 563

Statutes respecting the St. Patrick's Home at Halifax. 560, 563

Privilege

See WITNESS.

Prohibition

See DISQUALIFICATION.

Public record

See RECORD.

Receiving stolen goods

See THEFT.

Recognizance

Recognizance or deposit as security for costs on appeal—Appellant not taken into custody.

The recognizance or deposit required to be given or made on appealing from a summary conviction under that statute (similar to Cr. Code sec. 880 (c)) is not invalid because the appellant was not first taken into custody. THE KING v. JORDAN, (B.C.) 438

Required on certiorari under Ontario provincial law. 567

Rule of High Court respecting. 568

Deposit in lieu of, on certiorari. 569

Record

Court of General Sessions—Public documents.

The judgments of the Courts of General Sessions in Ontario are public records, and the Clerk of the Peace holds them as their statutory custodian in the interests of the public generally and not as a deputy officer of the Crown. Any person tried and acquitted in such court is entitled to a copy of the record of such acquittal and the indictment without the fiat of or intervention by the Attorney-General of the province, and a mandamus will lie to the Clerk of the Peace to compel the delivery to him of certified copies.

THE KING v. SCULLY, (Ont.) 1

Note on records of acquittal. 8

Recorder's Court, Montreal

Statute respecting the Judges of the Sessions of the Peace for the City of Montreal; Statutes, 2 Edw. VII. (Que.), ch. 19. 564

Remission

Of penalty under provincial law; pardoning power. 345

Note on pardons and commutations. 354

Reserved case

No review of justifiable findings or questions of credibility of witness.

Where on a case reserved or a case stated by direction of a Court of Appeal the sole question is whether there was evidence of guilt, and no leave has been obtained to apply for a new trial on the ground that the verdict is against the weight of evidence, the finding of a jury, or of the trial judge trying the case without a jury, cannot be disturbed as to conclusions or inferences justly capable of being drawn from the evidence, or as to the credibility of the witnesses.

THE KING v. CLARK, (Ont.) 235

Respite sentence—Enforcement.

Where the conviction and sentence of a prisoner tried under the Speedy Trials Part (LIV.) is respite pending the hearing of an

Reserved Case—Cont.

appeal by way of case reserved, and the conviction is affirmed on the appeal, another judge may, in the absence of the trial judge from the province, give effect to the respited judgment by virtue of sec. 770.

THE KING v. BROOKS, (B.C.) 372

Resisting peace officer

See OBSTRUCTION.

Restitution

Order for restitution of stolen property—Compensation for loss of property.

To entitle the aggrieved party to an order for the restitution to him of money found on the prisoner convicted of stealing money from the person, proof must be adduced identifying the money so found as the money which was stolen. Where the accused was convicted of the theft of the bank notes but there was no evidence to identify the same with the bank notes found on and taken from the prisoner at the time of arrest, and no application was made immediately after the conviction for an order of compensation to the prosecutor for his loss, an order may be properly made ex parte for the restoration to the prisoner of the money so taken for him.

THE KING v. HAVERSTOCK, (N.S.) 113

Sanitary regulations.

Providing conveniences in shops; Ontario statute.

565

Search

Of prisoner on his arrest or detention.

392

Security for costs

See APPEAL.

Seduction

"Under promise of marriage"—"Under" equivalent to "by means of"—Prior engagement to marry—Renewal of promise.

To constitute the offence of seduction "under promise of marriage" provided for by Code sec. 182, it must be shewn that the seduction was accomplished by means of the promise. A finding by the jury that the accused had previously become engaged to marry the girl and that he renewed the promise of marriage at the time of seduction is insufficient to sustain a conviction for seduction under promise of marriage.

THE QUEEN v. WALKER, (N.W.T.) 465

Sentence

Illegality of sentence—Imprisonment longer than is authorized.

Habeas corpus does not lie to correct a sentence of imprisonment passed by a County Court Judge's Criminal Court alleged to be for a time longer than is authorized. The proper mode of procedure is by case reserved or by appeal under Part LII. of the Code.

THE KING v. KAVANAGH, (N.S.) 507

Servant

Note on fraudulent conversion by clerks, servants or agents; distinction between "servant" and "agent"; Cr. Code secs. 308, 319 80
And see AGENCY.

Sheep protection

Ontario Sheep Protection Act—Owning vicious dogs—Order for destruction—Order for damages—Separate information or complaint.

The offence under the Ontario Sheep Protection Act of possessing a dog which has worried sheep is committed in the district in which the owner of the dog resides and where the dog is ordinarily kept, notwithstanding that the sheep worrying may have taken place in another district. A justice of the peace has no jurisdiction to try a charge in respect of such an offence alleged to have been committed in an incorporated town having a police magistrate of its own, except in the event of the latter's illness, absence or request (R.S.O. 1897, ch. 87, sec. 7). A summary proceeding under that statute before a justice to recover damages for the killing of sheep by dogs is not ancillary to the proceedings under the same statute for the offence of possessing dogs which have killed sheep, and an order for such damages cannot be made on the trial of the complaint for possessing. Semble, a justice of the peace may try a complaint under that statute for the recovery of damages if he has jurisdiction in the district in which the sheep were killed or injured.

THE KING v. DUEBING, (Ont.) 135

Shipping

Ship collision; negligence; manslaughter. 210

Shops regulation

Ontario statute of 1901 respecting. 565

Speedy trial

Election of trial without jury—No right to re-elect.

Where a prisoner on arraignment before the County Court Judge elects in favour of a speedy trial under Part LIV. of the Code, he cannot withdraw the election so made and obtain a trial by jury. Sub-sec. 5 of Code sec. 767, as amended 1900, gives the accused the right of re-election only in case his first election was for trial by jury.

THE KING v. KEEFER, (Ont.) 122

Sentence respited pending reserved case.

Where the conviction and sentence of a prisoner tried under the Speedy Trials Part (LIV.) is respited pending the hearing of an appeal by way of case reserved, and the conviction is affirmed on the appeal, another judge may, in the absence of the trial judge from the province, give effect to the respited judgment by virtue of sec. 770.

THE KING v. BROOKS, (B.C.) 372

Speedy trial—Cont.

Theft—Form of “charge”—Record on speedy trial—Code forms MM and NN.

A charge of theft preferred under the speedy trials clauses of the Code is sufficient if it states that the accused “unlawfully did steal,” etc., without specifically averring a taking or converting “fraudulently and without colour of right and with intent,” etc., in the words of sec. 305 of the Criminal Code. As the statutory form of record under the speedy trials clauses (Code forms MM and NN) framed in respect of a charge of theft, does not contain such particulars, the description of the offence following such form must be held sufficient in the “charge” and in all the proceedings prior thereto. **THE KING v. ARTHUR GEORGE, (N.S.)** 469

Note on electing speedy trial without jury. 126

Staple commodities

Statute of 1902 amending the Act respecting the Packing and Sale of Certain Staple Commodities. 562

Stated case

Stated case dismissed for non-compliance with statutory conditions—Subsequent appeal from conviction.

A person “appeals” when he formally gives notice to the opposite party of his intention to appeal, although he does not in fact comply with the conditions precedent required to bring the appeal on for hearing. (Code sec. 900.) Under a provincial enactment, similar to sub-sec. 15 of Code sec. 900, providing that a person appealing by way of stated case to a Superior Court shall be taken to have abandoned his right of appeal to a County Court, the appellant by obtaining a case to be stated elects that mode of appeal and cannot revert to an appeal to the County Court on the stated case being dismissed for non-compliance with statutory conditions. **COOKSLEY v. TOOMATEN OOTA, (B.C.)** 26

B.C. Summary Convictions Act—Transmitting case to District Registry.

The provision in sec. 87 of the B.C. Summary Convictions Act, that the appellant shall, within three days after receiving the case stated, transmit it to the District Registry, is a condition precedent to the jurisdiction of the Court to hear the appeal.

COOKSLEY v. NAKASHIBA, (B.C.) 111

Recognizance imperative—Cash deposit not good—Criminal Code sec. 900 (4).

A cash deposit cannot be accepted in lieu of a recognizance on an appeal by way of “stated case” from a summary conviction. The recognizance required by Code sec. 900 is a condition precedent to the jurisdiction of the Court to hear the appeal.

THE KING v. GEISER, (B.C.) 154

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Stealing

See THEFT.

Subornation

See PERJURY.

Summary conviction

See CONVICTION.

Summary trial

Theft—Conviction for attempt.

Per Street, J.—It is competent for a magistrate upon the summary trial before him of a prisoner charged under sec. 783 (a) of the Criminal Code with having committed theft, to convict him

Summary trial—Cont.

of the offence of attempting to commit it provided for in sec. 783 (b). A conviction on summary trial that the accused "attempted to pick the pocket" of a person namely, sufficiently describes the offence of attempting to commit theft.

THE KING v. MORGAN, (Ont.) 63

Effect of consent to summary trial—Convicting for attempt only—Describing the offence.

Per Court of Appeal.—Where there has been a valid conviction on a summary trial by a magistrate, and the accused has been imprisoned thereunder without a formal warrant of commitment, in lieu of which the original record of conviction was delivered to the gaoler, the Court may on habeas corpus allow a formal commitment to be lodged, and direct the detention of the prisoner in the meantime under sec. 752. The provision of sec. 711 of the Code that when the complete commission of the offence charged is not proved, but the offence establishes an attempt to commit the offence, the accused may be convicted of the attempt applies to summary trials before city and town police magistrates under sec. 785 of the Code, as well as to trials upon indictment. On a summary trial before the police magistrate of a city or town under sec. 785 of the Code, the consent of the accused to be tried summarily is to be taken as a consent to a summary trial for whatever offence he might be found guilty of at a Court of General Sessions were he being there tried on a like charge. Per Moss, J.A.—On a "summary trial" proceeding before a "magistrate" under sec. 783 for theft under the value of \$10, the magistrate must, before he asks the accused the statutory question as to whether or not he consents to summary trial, satisfy himself firstly, that the property is alleged to have been stolen, and secondly, that the value does not exceed \$10. Quære, whether a magistrate trying a case summarily under sec. 783 and not under sec. 785, on a charge of theft where the value is under \$10 could convict for an attempt. THE KING v. MORGAN (No. 2), (Ont.) 272

Consent to summary trial—Want of sworn information.

Where the accused found committing a criminal offence is arrested without warrant by a peace officer, and on being brought before a police magistrate a written charge not under oath is read over to him, and he thereupon consents to be tried summarily, the police magistrate has jurisdiction to try the case, although no information has been laid under oath.

THE KING v. McLEAN, (N.S.) 67

By Recorder's Court, Montreal—No right of appeal.

No appeal lies from the decision of the Recorder's Court of Montreal holding a "summary trial" under Cr. Code, sec. 783.

THE KING v. PORTUGAIS, (Que.) 100

Summary Trial—Cont.**Disorderly house—Inmate—Form of conviction.**

Where a conviction made by a city police or stipendiary magistrate for being an inmate of a disorderly house follows the Code, form WW, and does not recite that the accused was "charged before him in the words of form QQ, the inference is that the prosecution is brought under the vagrancy clauses (207 (j) and 208) and not under the summary trials procedure, secs. 783 (f) and 788. (Per Townshend, J.) Where the proceedings are taken under the "summary convictions" procedure, a conviction inflicting a punishment in excess of that authorized on summary conviction cannot be supported in habeas corpus proceedings as a conviction on "summary trial" under which the punishment inflicted is authorized, notwithstanding that the magistrate was one authorized to hold a summary trial, and that the offence was one of the class for which the consent to such trial is dispensed with by statute. (Per Townshend, J.) As there is an appeal from a summary conviction on such a charge and none from a conviction on summary trial, a strict construction of the proceedings is required in favour of the preservation of the right of appeal. (Per Townshend, J.)

THE KING v. LAURA CARTER, (N.S.) 401

By police magistrate under Part LV.; no right of appeal. See APPEAL (R. v. Nixon). 32

Note on sentences and commitments on summary trials. 277

For obstructing a peace officer; jurisdiction of two justices to try. 304

Summons**Conviction quashed for defect in service—Second summons—Prohibition against.**

Where a summary conviction has been removed by certiorari, together with the information and proceedings thereon, and the conviction is thereupon quashed, the information becomes part of the record in the Court above and cannot be returned to the magistrate for the purpose of a second summons thereon, although the ground for quashing the conviction was that the defendant had not been served, and had not authorized an appearance for her. An order for the return of any of the proceedings to the convicting justice is only authorized under Cr. Code sec. 895 in cases where formerly a procedendo would have issued upon the conviction being affirmed, and not where the conviction is quashed. Prohibition will be granted against a justice to prevent his proceeding under a second summons after the quashing of a conviction for want of service of the first summons or of appearance there-

Summons—Cont.

under. *Semble*, per Killam, J., the justices in proceeding with the second summons were guilty of contempt of Court, notwithstanding that the information had been returned to them under a Judge's order.

THE QUEEN v. ZICKRICK, (Man.) 380

Sunday observance

Municipal by-law against Sunday trading—Trifling sale—Review of unreasonably large fine.

Where an unreasonably large fine has been imposed by a magistrate under a municipal by-law for a trifling offence thereunder, the Court having jurisdiction to re-try the case on appeal may set aside the conviction and re-convict with a lesser penalty.

SING KEE v. JOHNSTON, (B.C.) 454

Prohibition of Sunday work of employees in bake shops. 565

In barber shops. 566

Theft

Cattle stealing—Right to trial by jury—N.W.T. Act, sec. 66.

The indictable offence of "stealing cattle" (Code, sec. 331) is theft within the provisions of the North-West Territories Act respecting summary trials without a jury. Although the punishment which may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, a person charged with having stolen cattle the value of which does not, in the opinion of the trial Judge, exceed \$200, has not the right in the N.W. Territories to be tried by jury.

THE QUEEN v. PACHAL, (N.W.T.) 34

Stealing under a power of attorney—Particulars.

An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property (Code sec. 309), but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a reserved case as to whether a verdict of guilty on such indictment was valid or not. A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed.

THE QUEEN v. FULTON, (Que.) 36

Theft—Cont.

Fraudulent conversion—Continuity of acts—Offence completed in another district.

The offence of fraudulent conversion of the proceeds of a valuable security mentioned in Code sec. 308, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district, and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. **THE QUEEN v. HOGLE, (Que.)** 53

Conviction for attempt—Description of offence.

It is competent for a magistrate upon the summary trial before him of a prisoner charged under sec. 783 (a) of the Criminal Code with having committed theft, to convict him of the offence of attempting to commit it provided for in sec. 783 (b). A conviction on summary trial that the accused “attempted to pick the pocket” of a person namely, sufficiently describes the offence of attempting to commit theft. **THE KING v. MORGAN, (Ont.)** 63

Theft by municipal officer—Collection of unauthorized rate.

A charge against a city officer for collecting sums of money upon the pretence that they were payable to the city and not there-after accounting for the same is not sustainable as a charge of theft, if in fact the sums collected were not payable to the city. To constitute the offence of theft (Code sec. 305) or of theft by a clerk (sec. 319 (a)) or of theft by municipal employees (sec. 319 (c)) the person alleged to have been defrauded by the taking must have had a right at the time of the taking either to the ownership or to the possession of the property taken. An indictment against a Government or municipal officer for theft or embezzlement under Code sec. 319 (c) would be demurrable if it did not allege that the officer had received the money by virtue of his employment, but on such being alleged and proved, the wrongful appropriation is an offence under sec. 319 (c) whether the property be public (or municipal) property or not.

THE QUEEN v. TESSIER, (Que.) 73

Describing the offence—Proof of principal offence on a charge of attempt.

An indictment charging that the accused unlawfully attempted to steal from the person of an unknown person the property of such unknown person, without giving the name of the person against whom the offence was committed, or the description of the property the accused attempted to steal, is sufficient. Where a prisoner is indicted for an attempt to steal, and the proof estab-

Theft—Cont.

lishes that the offence of larceny was actually committed, the jury may convict of the attempt, unless the Court discharges the jury and directs that the prisoner be indicted for the complete offence (Code sec. 712).

THE QUEEN v. TAYLOR, (Que.) 89

Theft of bank notes—Searching prisoner after arrest—Identification of property—Order for restitution.

To entitle the aggrieved party to an order for the restitution to him of money found on the prisoner convicted of stealing money from the person, proof must be adduced identifying the money so found as the money which was stolen. Where the accused was convicted of the theft of bank notes but there was no evidence to identify the same with the bank notes found on and taken from the prisoner at the time of arrest, and no application was made immediately after the conviction for an order of compensation to the prosecutor for his loss, an order may be properly made *ex parte* for the restoration to the prisoner of the money so taken for him.

THE KING v. HAVERSTOCK, (N.S.) 113

Theft by employee—Factory regulations for entry and checking of goods removed to warehouse—Collusive arrangement with other employees.

Where the prisoner, being the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to the branch store without charging them or keeping the usual check on them which his employers' system required, and had the goods delivered to a customer of his branch without charging the customer, the prisoner stating that for the benefit of his employers he had merely postponed the charging of the goods in order to give the customer a longer credit than was customary and to so retain the customer's trade; these facts will constitute "theft" under the Code if credence is not given to the prisoner's explanation. The goods having been taken by the prisoner with knowledge that his doing so was contrary to the employers' rules and regulations and with intent to deprive the owner thereof, the taking was fraudulent and without color of right within Code sec. 305.

THE KING v. CLARK, (Ont.) 235

Fraudulent misappropriation by co-owner—Fraudulent receiving by another co-owner.

Theft by the fraudulent appropriation by the principal and a fraudulent receiving by an accessory before the fact of the property so appropriated may take place at the same time and by the same act. A conviction for receiving is good, although the same evidence would have supported a conviction for theft. On a charge of fraudulently receiving stolen property the previous con-

Theft—Cont.

viction of the principal for the theft is presumptive evidence that everything in the former proceeding was rightly and properly transacted, but it is competent for the alleged receiver to controvert the guilt of the principal. A conviction for theft may be made against a co-owner fraudulently misappropriating the fund (Code secs. 305, 311) although the facts also prove the offence of criminal breach of trust (Code sec. 363).

McINTOSH v. THE QUEEN, (Can.) 254

Theft by agent—Fraudulent conversion—"Received on terms," meaning of.

The fraudulent conversion by an agent of money received by him upon the account of his principal is punishable under Code sec. 308, although no terms requiring him to account for or pay the same to the principal were imposed by the party paying. Where the person receiving the money thereupon holds it on terms arranged between himself and a third party to whom the money belongs requiring him to account for or pay the same to such third party, such money is money "received on terms requiring him to account for or pay the same," etc., within Code sec. 308.

THE QUEEN v. UNGER, (Ont.) 270

Speedy trial—Form of "charge"—Describing the offence.

A charge of theft preferred under the speedy trials clauses of the Code is sufficient if it states that the accused "unlawfully did steal," etc., without specifically averring a taking or converting "fraudulently and without colour of right and with intent," etc., in the words of section 305 of the Criminal Code. As the statutory form of record under the speedy trials clauses. (Code forms MM and NN) framed in respect of a charge of theft, does not contain such particulars, the description of the offence following such form must be held sufficient in the "charge" and in all the proceedings prior thereto.

THE KING v. ARTHUR GEORGE, (N.S.) 469

Note on fraudulent conversion by clerks, servants or agents; distinction between "servant" and "agent"; Cr. Code secs. 308, 319. 80

Receiver controverting guilt of principal; note. 269

Of cattle; evidence of ownership; cattle brands. R. v. FORSYTHE (N.W.T.). 475

Time

Fraudulent concealment and removal of goods—Time of offence of concealment.

A conviction on a charge of fraudulent concealment of goods with intent to defraud an insurance company will not be set aside because it appears in the evidence that a part of the goods had been

Time—Cont.

removed a month before the date of removal of the remainder, which latter removal took place on the date charged in the indictment as the date of concealment. The date of removal is not necessarily the date of concealment, and the conviction would be valid if the accused were still keeping the goods in concealment on or about the date charged in the count, although the removal took place a month prior thereto. On a further count for fraudulent removal of goods with intent to defraud, a removal of part of the goods a month prior to the time of the offence as charged is not to be presumed to be a part of one continuous taking with the removal of the remainder on the date charged. Although evidence of the first taking was admissible to shew the intent on the second taking which constituted the charge against the accused, the Judge should not have told the jury that they could convict for either the first or second taking or for both, and the Judge having certified his opinion that the jury were materially influenced by the evidence of the first taking the conviction on the count for fraudulent removal should be set aside.

THE KING v. HURST, (Man.) 338

And see LIMITATION.

Transient traders

Transient trader's license by-law—Prosecution of person in same trade as magistrate—Disqualification.

A magistrate who is engaged in the same kind of business as a trader prosecuted under a transient trader's license law is thereby disqualified from adjudicating upon the charge.

THE KING v. LEESON, (Ont.) 184

Transient traders' license—Goods ordered to be made from samples—"Offering goods for sale," meaning of.

The Ontario Municipal Act, R.S.O. 1897, ch. 223, sec. 583, does not require a transient trader's license from a person who engages a room at a hotel and there solicits orders for clothing to be made up from samples of cloth exhibited, and to be forwarded when made up to the customer. Such a person is not a "hawker" or "pedlar" under the Municipal Act, and a transient trader cannot be said to "offer" goods for sale within the meaning of the statute unless there is some visible presentation of the goods themselves which are the subject of the sale. The Ontario statute 2 Edw. VII. (1902), ch. 12, sec. 14, which declares that no conviction under the Ontario Summary Convictions Act shall be removed by certiorari except upon the ground that an appeal would not afford an adequate remedy does not prevent the granting of the writ where the magistrate had no jurisdiction over the matter adjudicated.

THE KING v. ST. PIERRE, (Ont.) 365

Translation

Evidence of French-speaking witnesses against English-speaking prisoner not translated into English—Sufficient that prisoner represented by French-speaking counsel.

Where an English-speaking prisoner in the Province of Quebec is represented at his trial by counsel speaking the French language, and no request is made for a translation of the testimony of French-speaking witnesses into English, for the benefit of the prisoner, the failure to so translate as to enable the prisoner to personally understand the evidence is not a limitation of his right to make "full answer and defence" to the charge, and will not invalidate a conviction. **THE KING v. WILLIAM LONG, (Que.)** 493

Trial

See **CONVICTION; INDICTMENT; RESERVED CASE; SPEEDY TRIAL; SUMMARY TRIAL; VERDICT.**

Unwholesome foods

Selling unwholesome goods; offering for sale meat unfit for food; indictable offence; similar offence under provincial law triable summarily; changing preliminary enquiry into summary proceeding; Public Health Act (Ont.); Crim. Code 194.

Vagrancy

Disorderly house; inmate; form of conviction. 401

Variance

See **CONVICTION.** ..

Verdict

Variance between pronouncement and formal record assented to—Mistaken reference to two counts in indictment containing only one.

The verdict of the jury in a criminal case must be taken to be that which was recorded by the trial Judge on the back of the indictment and read over to and formally assented to by the jury; and, where the same is in due form, it is immaterial that prior thereto the foreman of the jury on stating their verdict to the Court had erroneously referred to the two propositions submitted in the Judge's charge as the first and second count respectively, and had stated that they disagreed on the first count and found the prisoner guilty on the second count, there being in fact only one count in the indictment. **THE KING v. RICE, (Ont.)** 509

Note on the manner of taking a verdict in a criminal case. 525

Voting

Wilfully and corruptly voting without legal right.

Where the doing of a particular act is prohibited by statute on public grounds, and the statute does not declare a mode of enforce-

Voting—Cont.

ing the prohibition, the offence is indictable. A person who without lawful excuse wilfully and corruptly votes more than once at a municipal election for city aldermen by general vote under sec. 158 (a) of the Ontario Municipal Act is guilty of an indictable offence by virtue of sec. 138 of the Criminal Code (disobedience of statutes). Wrongfully voting twice at an election would not be indictable at common law unless prohibited by statute, and, *semble*, every contempt of a statute is indictable at common law where no other mode of punishment is provided.

THE KING v. MEEHAN (No. 2), (Ont.) 312

View

View of locus in quo by magistrate—Certiorari taken away by statute—Defect in procedure depriving accused of fair trial.

In a summary proceeding for an illegal sale of liquor under the Indian Act, a conviction will be quashed if, after the close of the evidence, the magistrate went alone and took a view of the place of sale, and so stated when giving his judgment, and this notwithstanding that the defendant was present when the view was had. A statute which declares that convictions thereunder shall not be removed by certiorari into any Superior Court is not a bar to the issue of a certiorari upon the ground of improper conduct of the magistrate, by which the accused was deprived of a fair trial. The powers of amendment conferred by Code sec. 889 in respect of convictions removed by certiorari do not apply where there is an inherent defect in procedure which has deprived the accused of a fair trial, *ex. gr.*, a view of the locus in quo taken by the magistrate in the absence of the parties.

RE SING KEE, (B.C.) 86

Warrant

See **ARREST.**

COMMITMENT.

Withdrawal

Of summary proceedings—Leave of magistrate.

After the evidence has been heard in summary proceedings the justice is not bound either to convict or discharge the defendant; he may allow the prosecutor to withdraw the charge. Such withdrawal may be allowed even when another information covering the same offence has been laid by the same prosecutor against the same defendant, and the determination thereof is still pending.

EX PARTE WYMAN, (N.B.) 53

Witness

Co-defendant a competent but not a compellable witness.

One co-defendant cannot be called as a witness by another co-defendant and compelled to give evidence, but a co-defendant may testify if he chooses to do so.

THE QUEEN v. CONNORS, (Que.) 70

Witness—Cont.

Criminating answers—Protection on subsequent criminal proceedings if objection taken—Canada Evidence Act, sec. 5.

If a witness when called upon to testify in a criminal proceeding does not object to do so upon the ground that his answers may tend to criminate him, they are receivable against him in any criminal proceeding against him thereafter other than a prosecution for perjury in giving such evidence, and if he does object he is bound to answer, but his answers are then not receivable in evidence against him in a subsequent criminal proceeding except such a charge of perjury. Where on a case reserved or a case stated by direction of a Court of Appeal the sole question is whether there was evidence of guilt, and no leave has been obtained to apply for a new trial on the ground that the verdict is against the weight of evidence, the finding of a jury, or of the trial Judge trying the case without a jury, cannot be disturbed as to conclusions or inferences justly capable of being drawn from the evidence, or as to the credibility of the witnesses.

THE KING v. CLARK, (Ont.) 235

Prisoner as a witness—Charge of robbery—Cross-examination as to previous convictions for indictable offences—Relevancy.

An accused person examined as a witness on his own behalf, may be cross-examined as to whether he has been previously convicted of an indictable offence, whether or not the charge upon which he is being tried sets out the fact of a previous conviction, and although no evidence of good character had been adduced for the defence. The question is relevant to the issue as affecting the credibility of the accused as a witness.

THE KING v. D'AOUST, (Ont.) 407

Note on cross-examination of accused tendering himself as a witness.

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Words and phrases

"Anything capable of being stolen."	357
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